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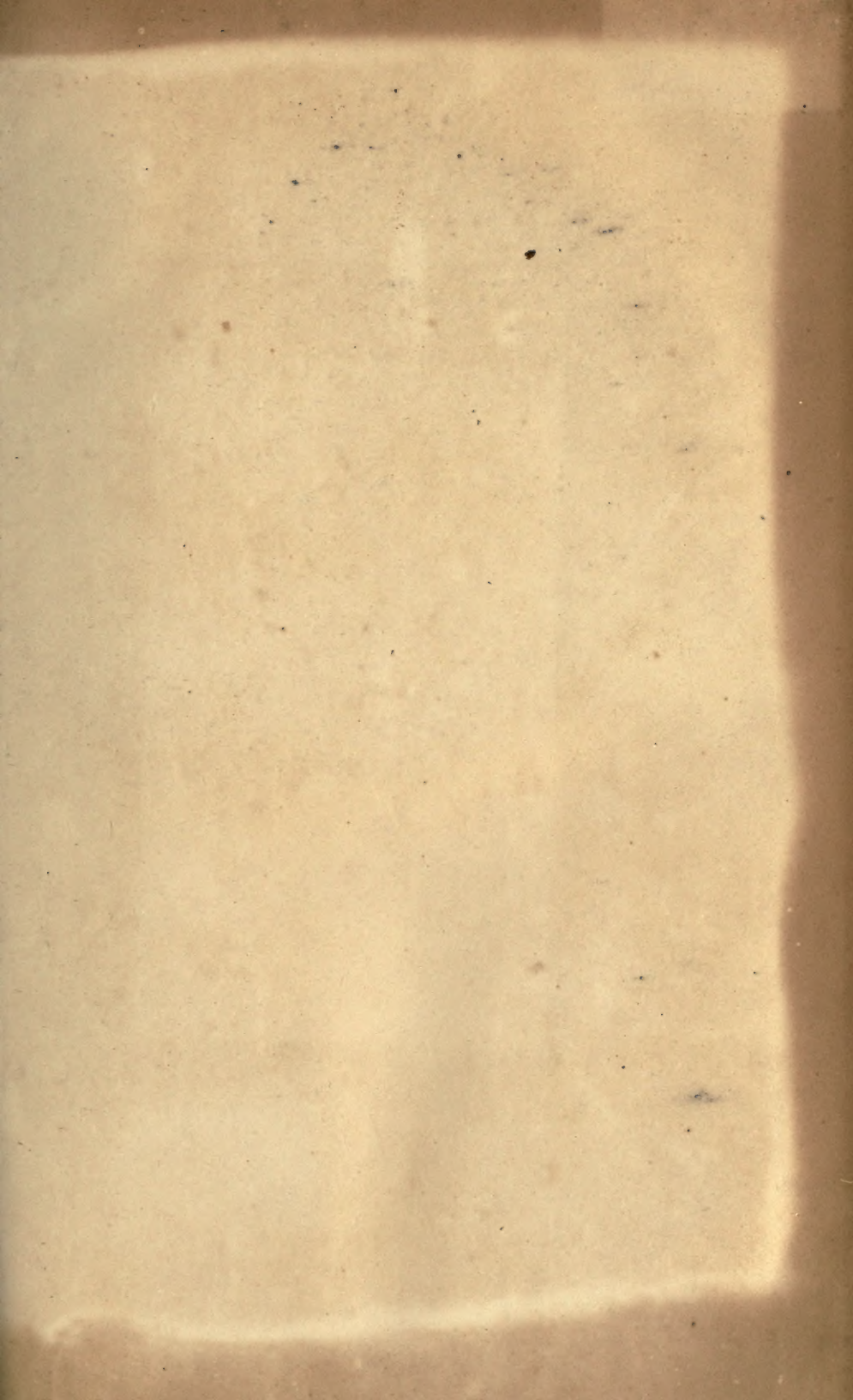
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PRACTICE,
PLEADING AND FORMS

IN ACTIONS
BOTH LEGAL AND EQUITABLE.

FORMS IN ACTIONS, IN SPECIAL PROCEEDINGS, IN PRO-
VISIONAL REMEDIES, AND OF AFFIDAVITS,
NOTICES, ETC.

ESPECIALLY ADAPTED TO THE PRACTICE
IN THE STATES OF CALIFORNIA,
OREGON, NEVADA AND THE
TERRITORIES.

AND APPLICABLE ALSO
TO THE PRACTICE IN NEW YORK, OHIO, INDIANA, IOWA,
AND OTHER STATES WHICH HAVE
ADOPTED A CODE.

By MORRIS M. ESTEE,
COUNSELOR AT LAW.

IN THREE VOLUMES.
VOL. III.

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PLEADING AND FORMS

ALBANY, N. Y. 1854.

PART FIFTH.

PROCEEDINGS TO OBTAIN JURISDICTION.

CHAPTER I.

SUMMONS.

1. In ordinary terms, a summons is a command to appear. In our State, it is a notice to defendant that an action has been commenced against him. It informs defendant *who* has commenced the action, *where* it is brought, in what *court* it is brought, the *relief* demanded, and that, if he fails to answer within ten days or in such other time, depending upon *where* the summons is served, *default* will be taken against him.

2. In California, the summons always follows the complaint, and is only issued after the filing of a complaint; but in many States the summons precedes the complaint, and the issuance of it is the first step, or commencement of the action; but here the action is commenced by the two acts of "filing of a complaint in the court where the action is brought, and the issuance of a summons thereon." In England, all personal actions are brought by one uniform *writ of summons*, which is issued out of the court where the action is brought, and directed to the defendant, commanding him to cause an

appearance to be entered within a certain number of days after the writ is served, formerly eight. 3 *Steph. Com.* 566.

3. In California, actions are commenced by filing the complaint, and issuance of the summons thereon, which may be done at any time within the year after filing the complaint. (*Cal. Pr. Act*, § 23.) Since the amendment of 1860, the Clerk is not authorized to issue a summons after the expiration of a year after filing the complaint, without an order of the Court; and if the Court is authorized to order the issuance of a summons after that period, the exercise of the power rests in its discretion; (*Dupuy v. Shear*, 29 *Cal.* 238;) and an order of the Court striking out the complaint where no service was had on the defendant until nine years had elapsed, was not an abuse of discretion. * (*Dupuy v. Shear*, 29 *Cal.* 238.) Unless the summons and a certified copy of the complaint, duly attested and in condition to serve, are placed at the disposal of plaintiff for service within one year from the filing of the complaint, the action should be dismissed. (*Reynolds v. Page*, 35 *Cal.* 295.) Unless this be done, the summons is not issued, within the meaning of Section 23 of the Practice Act. *Id.*

4. The summons shall be signed by the Clerk, and directed to the defendant, and be issued under the seal of the Court. (*Cal. Pr. Act*, § 23.) At the time of the issuance of summons, by the California Practice Act, the Clerk is required to indorse on the summons the names of plaintiff's attorneys. (*Id.* § 24.) In New York, the summons must be subscribed by the plaintiff or his attorney. (*N.Y. Code*, § 128; *Weare v. Slocum*, 1 *Code*

Rep. 105; *Mut. Life Ins. Co. v. Ross*, 10 *Abb. Pr.* 260; *Saunderson v. Jackson*, 3 *Esp.* 180; *Schneider v. Norris*, 2 *M. & S.* 286; *contra*, *Farmers' Loan Co. v. Dickson*, 9 *Abb. Pr.* 61; 17 *How. Pr.* 477.) But that printed subscription is sufficient, see (*Brainerd v. Heydrick*, 32 *How. Pr.* 97.) As to waiver of the indorsement by appearance, see *Sprague v. Irwin*, 27 *How. Pr.* 51.

SUMMONS, WHAT TO CONTAIN.

5. The summons shall state: *First*, The names of the parties to the action; (*Gardner v. Clark*, 8 *How. Pr.* 449; *Elliott v. Hart*, 7 *Id.* 25; *Blanchard v. Strait*, 8 *Id.* 83;) or the name by which the party is known. (*Cooper v. Burr*, 45 *Barb.* 9; *Miller v. Stettiner*, 7 *Id.* 692.) By the following authorities a defect in the name of the defendant has been disregarded. (*Cook v. Kelsey*, 19 *N.Y.* 412; *Yates v. Blodgett*, 8 *How. Pr.* 278; *Van Namee v. Peoble*, 9 *How. Pr.* 198; *Van Benthuyzen v. Stevens*, 14 *How. Pr.* 70.) Where a party sues or is sued in a representative character, the character should be stated after his name in the summons. (1 *Arch. Pl.* 81; 8 *How. Pr.* 84.) Where the summons describes the plaintiff as administrator, and in the complaint he is represented as suing in his individual capacity and for a demand in his own right, it was held a fatal variance. *Blanchard v. Strait*, 8 *How. Pr.* 83.

6. It shall state, *Second*, The name of the court in which the suit is brought. (*Dix v. Palmer*, 5 *How. Pr.* 233; *Yates v. Blodgett*, 8 *How. Pr.* 278; *Webb v. Mott*, 6 *Id.* 439; *Hewett v. Howell*, 8 *Id.* 346; *Tallman v. Hinman*, 10 *How. Pr.* 89; *Walker v. Hubbard*, 4 *Id.*

154; *James v. Kirkpatrick*, 5 *Id.* 241; *Ward v. Stringham*, 1 *C.R.* 118; *Anonymous*, 2 *C.R.* 75; *Merrill v. Grinnell*, 12 *L.O.* 286.) But a summons which does not name the court is not void; (*Tallmen v. Hinman*, 10 *How. Pr.* 89;) as a defendant on whom both summons and complaint have been served cannot object that the summons does not name the court if the complaint does. (*Yates v. Blodgett*, 8 *How. Pr.* 278; *Webb v. Mott*, 6 *Id.* 439; *Hewitt v. Howell*, 8 *Id.* 346.) Where the summons was headed with the words, "District Court," but was issued out of the County Court, under the County Court seal, and attested by the Judge of said Court, it was held good as the writ of the County Court. *Crane v. Brannan*, 3 *Cal.* 192.

7. It shall state, *Third*, The general nature of the action and the time in which the defendant must appear and plead; in other words, when it is returnable; and it must be made returnable at the time fixed by statute. (*People v. Woodlief*, 2 *Cal.* 241; *Porter v. Herman*, 8 *Id.* 625.) And that in case of his failure to appear, default will be taken. (*Porter v. Herman*, 8 *Cal.* 625.) If the sum sued for is certain in amount, or capable of being reduced to certainty by computation, the summons must state the amount for which judgment is demanded. (*People v. Bennett*, 6 *Abb. Pr.* 343.) And if radically defective in this respect, it will not support a judgment by default. *People v. Woodlief*, 2 *Cal.* 241; *Porter v. Herman*, 8 *Id.* 625.

8. In ejectment, if the summons contains no description of the demanded premises, except to refer to the complaint for such description, and two or more of the defendants reside in the same county, and the summons

is served on all defendants in that county, but a copy of the complaint on one only, the summons is sufficient to sustain a judgment by default against those not served with a copy of the complaint; (*Calderwood v. Brooks* 28 *Cal.* 151;) as a copy of the complaint need be served on only one of several defendants, where they all reside in the same county. (*Cal. Pr. Act*, § 28.) The requisites of the summons are fixed by statute. Consult *Cal. Pr. Act*, § 24; *Code of Oregon*, § 51; *Wash. T.* § 40; *Arizona*, § 24; *Idaho*, § 24; *Iowa*, § 2,812; 1 *N.Y. Code*, § 128; *Nash's Ohio Pl.* 19.

NOTICE IN SUMMONS.

9. There shall be inserted in the summons a notice: *First*, In actions arising on contracts for the recovery of money or damages, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint. (*Cal. Pr. Act*, § 26, Subd. 1.) Relief under this subdivision must be applied only to actions for a definite sum of money as such, and without calling upon the Court to ascertain or adjudge anything but the existence or terms of the contract. (*Tuttle v. Smith*, 6 *Abb. Pr.* 329; S.C., 14 *How. Pr.* 395; approved, *People v. Bennett*, 6 *Abb. Pr.* 343; *Luling v. Stanton*, 8 *Id.* 378; *Cobb v. Dunkin*, 19 *How. Pr.* 164; reversing S.C., 17 *Id.* 97; *Cook v. Pomeroy*, 10 *How. Pr.* 103, being overruled; see, also, *Norton v. Cary*, 14 *Abb. Pr.* 364; S.C., 23 *How. Pr.* 469.) Thus, in cases for goods sold and delivered. (*Diblee v. Mason*, 1 *Code R.* 37.) For liquidated damages on breach of contract. (*Hyde Park v. Teller*, 8 *How. Pr.* 504.) For specific sum on breach of contract. (*Croden v. Drew*, 3 *Duer*, 654.) For penalty given by

statute. (People v. Bennett, 5 *Abb. Pr.* 384; Commrs. of Albany v. Classon, 17 *How. Pr.* 193.) For money demand where the plaintiff waives *tort*. (Goff v. Edgerton, 18 *Abb. Pr.* 381.) So, an action on an undertaking in replevin is substantially one for the payment of money, and a summons for a money demand in such a case is proper. Montegriffo v. Musti, 1 *Daly*, 77.

10. In other actions there shall be inserted: *Second*, That if the defendant fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded therein. (*Cal. Pr. Act*, § 26.) The notice in the summons should, however, contain a reference to the complaint. Foster v. Wood, 30 *How. Pr.* 284; S.C., 1 *Abb. Pr. (N.S.)* 150.

AMENDMENT OF SUMMONS.

11. The Court may allow the summons to be amended, by inserting a notice to the defendant of the nature of the demand, and that, unless he appear and answer within the time specified, judgment by default will be taken against him. (Pollock v. Hunt, 2 *Cal.* 194.) But amendments can only be made by order of the Court, upon motion. (McCrane v. Moulton, 3 *Sand.* 736; Allen v. Allen, 14 *How. Pr.* 248; Weare v. Slocum, 1 *Code Rep.* 105; 3 *How. Pr.* 379.) Sheriffs have no right, after making a return, to amend it, so as to affect rights which have already vested in third parties. (Newhall v. Provost, 6 *Cal.* 87; Webster v. Haworth, 8 *Id.* 25.) But courts should exercise great liberality in allowing sheriffs to amend so as to make returns conform to facts, and to correct errors and mistakes. Gavitt v. Doub, 23 *Cal.* 78.

SERVICE OF SUMMONS.

12. After the issuance of the summons by the Clerk, the next step is to have it properly served, together with a copy of the complaint. Allowing an action to rest without serving of summons for two years and eight months after the summons is issued, is such a want of diligence as to justify the Court in dismissing the action. (*Grigsby v. Napa Co.*, 36 *Cal.* 585.) If notice is given of a motion to dismiss an action for want of prosecution before summons is served; and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment is not entered up, the entry of the default does not preclude the Court from dismissing the action. The dismissal takes effect by relation back to the time of the service of the motion. (*Grigsby v. Napa Co.*, 36 *Cal.* 585.) The Court has power to send a summons for service out of the City of San Francisco. *Chipman v. Bowman*, 14 *Cal.* 157.

13. When some of the defendants are not served with process, the plaintiff may proceed against those served. (*Ingraham v. Gildemeester*, 2 *Cal.* 88.) So, where S. A. B. admitted "due service" of summons in an action against them and others, the Court thereby acquired jurisdiction of them, and as to them the judgment was valid. (*Sharp v. Brunnings*, 35 *Cal.* 528.) Any writ or order and all other papers, in any civil suit or proceeding, may be served by telegraph. (*Laws of Cal.* 1862, p. 288, § 18.) In Oregon, service of complaint and notice upon a defendant before the same are filed in the office of the Clerk of the Court, is a good service. *Kieth v. Quinney*, 1 *Oregon*, 364.

SERVICE, BY WHOM MADE.

14. Service should be made: *First*, By the Sheriff of the County, or by his deputy. *Second*, By some person specially appointed by him, or by the Judge of the Court in which the action is brought. *Third*, By any white male citizen of the United States, over twenty-one years of age, and who is competent to be a witness. (*Cal. Pr. Act*, § 28.) If there be several defendants, all living in the County in which the action is brought, a certified copy of the complaint need be served only on one of the defendants. (§ 28, *Pr. Act*.) As to service of summons in the State of Oregon, see (*Laws of Oregon*, 98.) The service of summons by a person not a sheriff, as provided by the Practice Act, is a service "according to the course of the common law. *Peck v. Strauss*, 33 *Cal.* 678.

SERVICE, UPON WHOM MADE.

15. The summons must be served upon defendant *personally*, except in the following instances: *First*, In a suit against a corporation; *Second*, In a suit against a minor under the age of fourteen years; *Third*, In an action brought against an insane person. In the three excepted cases, the summons must be served on the person designated in the Statute (*Cal Pr. Act*, § 29), instead of the person sued in the action. That is to say, if the suit is against a domestic corporation, by delivery of a copy of summons "to the president or other head of the corporation, secretary (*Gillig v. Indep. G. and S. M. Co.*, 1 *Nev.* 247), cashier, or managing agent thereof; (*Aiken v. Quartz Rock Co.*, 6 *Cal.* 186;) if against a foreign corporation, or a non-resident joint

stock company, etc., to an agent, cashier, or secretary thereof. *Cal. Pr. Act*, § 29.

16. In counties where there is a Board of Supervisors, having an acting Chairman or President of such Board, the original process and papers shall be served on such Chairman or President, in the same manner as upon private persons; when there is no such Chairman or President, they shall in like manner be served on the County Judge of the County. (*Gen. Laws of Cal.* ¶ 1,210.) Where there are two parties who make adverse claim to be officers of such corporation, the proper person to be served is the officer *de facto*, the one having possession. (*Berrian v. Metho. So. in N.Y.*, 4 *Abb. Pr.* 424.) Service on a party in possession of the property, who does not appear to be one of the officers named, will not entitle the plaintiff to a judgment by default. (*Aiken v. Quartz Rock Co.*, 6 *Cal.* 186.) A baggage master, or one who merely sells tickets, is not "managing agent" of a railroad company. (*Flynn v. Huds. Riv. R.R Co.*, 6 *How. Pr.* 308.) A person acting under power of attorney for an insurance company located elsewhere is a "managing agent." (*Baine v. Globe Ins. Co.*, 9 *How. Pr.* 448.) As to sufficiency of service of summons on a corporation by the laws of Oregon, see *Laws of Oregon*, 1866, p. 9.

17. If against a minor under the age of fourteen years, to such minor personally, and, *also*, to his father, mother, guardian, or if there be none such within the State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed. (*Cal. Pr. Act*, § 29.) The Sheriff's certificate that he served the summons and

complaint, by leaving a copy at the place of residence of the defendant, with a white person over the age of fourteen, who was residing with the family, is sufficient service of summons in Oregon. *Laws of Oregon of 1866*, p. 98.

18. If against a person judicially declared to be of unsound mind, service must be made upon his guardian, if a guardian has been appointed. (*Cal. Pr. Act*, § 29.) In New York, service of summons on an insane person who has no committee, must be by personal service on such person. *Heller v. Heller*, 1 *Code R. (N.S.)* 390; 6 *How. Pr.* 194.

SERVICE, HOW MADE.

19. Under the Practice Act, personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statutes, the mode would be by showing the original under seal of the Court, and delivering a copy. (*Edmondson v. Mason*, 16 *Cal.* 386; *Beekman v. Cutter*, 2 *Code R.* 51.) Putting the defendant in unknown possession of a summons disguised and enveloped, is not a good service of summons. (*Bulkley v. Bulkley*, 6 *Abb. Pr.* 307.) Where defendant refuses to accept the summons, service may be made by "laying it down at any appropriate place in his possession." (*Davison v. Baker*, 24 *How. Pr.* 39.) But forcibly thrusting it upon him is improper. (*Id.*) Where, however, a defendant refused to receive a process, it was held that laying it on his shoulder was good service. (*Bell v. Vincent*, 7 *D. & R.* 233.) If a copy of the summons, and a certified copy of the complaint, are personally delivered to

the defendant, and issued from a court of general jurisdiction, the court thereby acquired jurisdiction of the person of the defendant. An irregularity in the mode of delivery is merely a ground of application to the court to set aside the summons. *Peck v. Strauss*, 33 *Cal.* 678.

SERVICE BY PUBLICATION.

20. The Statute provides how *service of summons* may be made *by publication*. This mode of service may be resorted to in three classes of cases only, to wit: *First*, When defendant resides out of the State. *Second*, When defendant has departed from the State. *Third*, When defendant cannot be found within the State, or when he conceals himself to avoid service. In such cases the court or judge may grant an order that the service be made by publication of summons. *Cal. Pr. Act*, § 30.

21. The existence of either one of these conditions is not alone sufficient. In addition thereto, it must also appear by affidavit that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action. (*Cal. Pr. Act*, § 30.) It is settled that the Statute providing the mode for acquiring jurisdiction of a defendant by the publication of summons, being in derogation of the common law, must be strictly followed in order to give the Court jurisdiction over the person of the defendant; (*Ricketson v. Richardson*, 26 *Cal.* 149; *Jordan v. Giblin*, 12 *Cal.* 100; *Forbes v. Hyde*, 31 *Id.* 342; *People v. Huber*, 20 *Id.* 81;) and no presumption in favor of jurisdiction acquired by publication of

summons will be indulged. *McMinn v. Whelan*, 27 *Cal.* 309; *Hallett v. Righters*, 13 *How. Pr.* 43; *Brisbane v. Peabody*, 3 *Id.* 109; *Kendall v. Washburn*, 14 *Id.* 380; *Titus v. Relyea*, 16 *Id.* 371; *Cook v. Farren*, 34 *Barb.* 95; 12 *Abb. Pr.* 359; 11 *Id.* 40; *Wortman v. Wortman*, 17 *Abb. Pr.* 66; *Fiske v. Anderson*, 33 *Barb.* 71; 12 *Abb. Pr.* 8.

WHAT IS SUFFICIENT PUBLICATION.

22. A publication of summons weekly, against a non-resident defendant, commencing on the 10th day of January, and ending on the 9th day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the 10th of April. (*Savings and Loan Society v. Thompson*, 32 *Cal.* 347.) If the last day of the publication is in the same week in which the three months expire, the publication is sufficient, although this day is less than three months from the first day of publication. (*Id.*) If some of the publications of a summons, including the last, are made on Sunday, in the regular issue of the paper, it does not vitiate the service. (*Id.*) The month contemplated by the Statute is a calendar and not a lunar month. *Id.*

23. When the time is important, courts will inquire into a day or fractional portion of a day. (*People v. Beatty*, 14 *Cal.* 566.) A judgment rendered against a party, who is absent from the State upon publication of the summons thirty days only, is void. (*Jordan v. Giblin*, 12 *Cal.* 100.) A publication for seventy days is held to be a publication for ten weeks. (*People v. Gray*, 10 *Abb. Pr.* 458.) A publication for thirty-nine days

held a publication for six weeks. *Olcott v. Robinson*, 21 *N.Y.* 150.

CHANGE IN SUMMONS INADMISSIBLE.

24. The summons must be published as it was when the order of publication was made. (*McMinn v. Whelan*, 27 *Cal.* 300.) For example, when an order was made for the service of summons by publication, and a summons was issued, and a supplemental complaint was afterwards filed, and a summons issued thereon, it was held that the original action became merged in the action as supplemented, and the court did not acquire jurisdiction of the persons of absent defendants by publication of the original summons, but it was essential to serve by publication the summons issued on the supplemental complaint. (*Forbes v. Hyde*, 31 *Id.* 342; *McMinn v. Whelan*, 27 *Cal.* 309.) Discrepancies of a purely literal character between the summons as issued, and as published, will be disregarded, where in sense and meaning they are identical. *Sharp v. Dugney*, 33 *Cal.* 505.

TIME TO APPEAR AFTER PUBLICATION.

25. The Practice Act (§ 31) further provides, in relation to service on non-residents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication:" *Held*, that the publication only affects the service of the summons, and the defendant is entitled to forty days after the period of publication to file his answer. *Grewell v. Henderson*, 5 *Cal.* 465.

DEPOSIT IN POST OFFICE.

26. In case of publication where the residence of a non-resident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served at his place of residence. *Cal. Pr. Act*, § 31; *Back v. Crussell*, 2 *Abb. Pr.* 386; *Van Wyke v. Hardy*, 11 *Abb. Pr.* 474; 20 *How. Pr.* 222.

27. Service of the summons upon infants, although under the age of fourteen years, should be made by depositing a summons and certified copy of the complaint in the post office, directed to the infant, the same as to other defendants. (*Gray v. Palmer*, 9 *Cal.* 616.) The failure to deposit such, when directed to a minor, is not cured by the appearance of the mother in her own behalf. *Gray v. Palmer*, 9 *Cal.* 616.

28. When an order for service by publication is obtained, if personal service out of the State is effected, it is unnecessary to proceed to make publication, and to deposit a summons in the post office. (*Abrahams v. Mitchell*, 8 *Abb. Pr.* 123.) In New York it is held that such personal service out of the State is only equivalent to mailing, and can have no greater effect. (*Fiske v. Anderson*, 12 *Abb. Pr.* 8.) A delay of four days in mailing, caused by waiting to have the papers printed, did not render the service irregular. (*Van Wyck v. Hardy*, 11 *Abb. Pr.* 473.) Fifteen days' delay would make it irregular. *Back v. Crussell*, 2 *Abb. Pr.* 386.

CHAPTER II.

FORMS OF SUMMONS AND AFFIDAVITS OF SERVICE.

No. 797.

Summons in Action on Contract for Payment of Money only.

[TITLE.]

The people of the State of California send greeting:

To defendant:

You are hereby required to appear in an action brought against you by the above named plaintiffs, in the District Court of the Judicial District of the State of California, in and for the City of and County of , and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this County; or, if served out of this County, but in this District, within twenty days; otherwise, within forty days; or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of dollars, gold coin of the United States, due from defendants to plaintiffs upon [a certain promissory note made by the defendants on the day of, 18..], particularly described in the complaint; also for interest thereon, at the rate of per cent. per month.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said plaintiffs will take judgment against you for said sum of dollars, in gold coin of the United States, interest and costs.

GIVEN under my hand and the seal of the District Court of the Judicial District of the State of California, in and for the City of and County of, this day of, 18...

A. B.,

Clerk.

By C. D.,

Deputy Clerk.

1. Notice.—A notice in summons, that plaintiff will take judgment for the given sum, “with interest” thereon from a specified day, is sufficient. (*People v. Woodlief*, 2 *Cal.* 241; *Porter v. Herman*, 8 *Cal.* 625; *Swift v. De Witt*, 3 *How. Pr.* 280; *Ridder v. Whitlock*, 12 *How. Pr.* 208.) In an action for work and labor done, and for the enforcement of a mechanic’s lien, it is sufficient if the notice in the summons says “that plaintiff will take judgment for a certain sum specified therein.” So *held* in the Supreme Court of Oregon. (*Willamette Falls and Mi. Co. v. Riley*, 1 *Oregon*, 183.) As to when the summons must specify the amount, see *Commr’s of Albany v. Classon*, 17 *How. Pr.* 193; *Cemetery Board v. Teller*, 8 *Id.* 504; *Diblee v. Mason*, 1 *Code R.* 37.

*No. 798.**Summons in Justice's Court.*

[TITLE.]

The people of the State of California send greeting:

To, defendant:

You are hereby summoned to appear before me, at my office in Township, in the County of, on the day of, A.D. 18..., at o'clock A.M., to answer to the complaint of the above named plaintiff, who claims to recover of you the sum of dollars, as principal and costs of protests, and interest on said amount, from the day of, 18..., at the rate of per cent. interest per annum, upon a certain draft drawn on one A. B. in favor of C. D., and indorsed to said plaintiff, as per complaint on file in my office, when judgment will be taken against you for the said amount, together with costs and damages, if you fail to appear and answer.

[Signature.]

No. 799.

Summons in Actions Arising on Contract for the Recovery of Money only, the Complaint not being Served. (Under N.Y. Code.)

[TITLE.]

You are hereby summoned to answer the complaint in this action, which will be filed with the Clerk of, and to serve a copy of your answer upon me, at my office, No., Street, in the City of, within twenty days after the service hereof

(exclusive of the day of service), and if you fail to do so, the plaintiff will take judgment against you for dollars, with interest from the day of, 18...

[DATE.]

A. B.,
Atty. for Plff.

To the defendant above named.

No. 800.

Summons in other Actions—the Complaint not being Served. (Under N.Y. Code, Sections 128, 129, 130.)

[TITLE.]

You are hereby summoned to answer the complaint in this action, which will be filed with the Clerk of, and to serve a copy of your answer upon me, at my office, No., Street, in the Town of, within twenty days after the service hereof (exclusive of the day of service), and if you fail to do so the plaintiff will apply to the Court for the relief demanded in the complaint.

[DATE.]

A. B.,
Atty. for Plff.

To the defendant above named.

NOTE.—It is of course understood that this is not the practice in California.

2. Actions for Relief.—A summons for relief is the proper form in an action in which a part of the relief sought is unliquidated damages for the breach of an agreement to carry on business. (*Tuttle v. Smith*, 6 *Abb. Pr.* 329; S.C., 14 *How. Pr.* 395.) Or for breach of agreement to convey real property. (*Johnson v. Paul*, 6 *Abb. Pr.* 335;

S.C., 14 *How. Pr.* 454.) Or in any action on undertaking of bail. (Kelsey v. Covert, 6 *Abb. Pr.* 336; S.C., 15 *How. Pr.* 92; Levy v. Nicholas, 15 *Abb. Pr.* 63.) Or on a constable's bond. (Mayor of New York, v. Lyons, 1 *Daly*, 296; 24 *How. Pr.* 280.) So, in an action for breach of warranty. (Dunn v. Bloomingdale, 6 *Abb. Pr.* 340; S.C., 14 *How. Pr.* 474.) So, in actions for conversion. (Voorhies v. Schofield, 7 *How. Pr.* 51; Ridder v. Whitlock, 12 *How. Pr.* 208.) So, in actions for an account of moneys collected. West v. Brewster, 1 *Duer*, 647; S.C. 11 *N.Y. Leg. Obs.* 157.

3. Actions for Relief.—Where an allegation of a mistake on a former accounting, and a demand for a new accounting, is contained in the complaint, the summons is properly for relief. (McDougall v. Cooper, 31 *N.F.* 498.) Against a carrier, for loss of goods. (Flynn v. Hudson River R.R. Co., 6 *How. Pr.* 308; Hyde Park v. Teller, 8 *Id.* 504; Hewitt v. Howell, *Id.* 346; Clor v. Mallory, 1 *Code Rep.* 126; Campbell v. Perkins, 4 *Seld.* 438.) Or for breach of contract to transport goods. (Luling v. Stanton, 2 *Hill.* 538.) On common law liability. (People v. Willett, 6 *Abb. Pr.* 37.) For unliquidated damages generally. (Croden v. Drew, 3 *Duer*, 654; Tuttle v. Smith, 14 *How. Pr.* 395; 6 *Abb. Pr.* 329; People v. Bennett, 6 *Abb. Pr.* 343; Salters v. Ralph, 15 *Abb. Pr.* 273; Levy v. Nicholas, 15 *Abb. Pr.* 63; Cobb v. Dunkin, 19 *How. Pr.* 164; Luling v. Stanton, 8 *Abb. Pr.* 378; 2 *Hill.* 538.) For liquidated and unliquidated damages. (Norton v. Cary, 14 *Abb. Pr.* 364; 23 *How. Pr.* 469; Hartshorn v. Newman, 15 *Abb. Pr.* 63; Levy v. Nicholas, *Id.*; Salters v. Ralph, 15 *Id.* 273; Henson v. Decker, 29 *How. Pr.* 385.

4. Actions for Relief.—In actions for fraud, the summons must apprise the defendant that on failure to answer judgment will be taken against him for the fraud. A mere notice that a money-judgment will be taken against him will not support a judgment for fraud. (Porter v. Hermann, 8 *Cal.* 619; Hartshorne v. Newman, 15 *Abb. Pr.* 63; Atwell v. Leroy, 14 *Abb. Pr.* 438; Travis v. Tobias, 7 *How. Pr.* 90; Field v. Morse, 7 *How. Pr.* 12.) Or to open an account on the ground of mistake. (McDougall v. Cooper, 31 *N.F.* 498.) So, for damages for death by wrongful act. (Doedt v. Wiswell, 15 *How. Pr.* 128.) So, on breach of contract to convey. (Johnson v. Paul, 14 *How. Pr.* 454; Kelsey v. Covert, 15 *Id.* 92; Dunn v. Bloomingdale, 14 *How. Pr.* 474; 6 *Abb. Pr.* 340.) For breach of contract to marry. (Davis v. Bates, 6 *Abb. Pr.* 15; McDonald v. Walsh, 5 *Id.* 68; McNeff v. Short, 14 *How.*

Pr. 463.) The cases of *Williams v. Miller*, 4 *How. Pr.* 94; 2 *Code Rep.* 55; and *Leopold v. Poppenheimer*, 1 *Code Rep.* 39, overruled.

5. Notice.—Under the New York Code, in all other actions than those arising in contract for the recovery of money only or damages, the summons will contain the above notice. *Cal. Pr. Act*, § 26; *N.Y. Code*, § 129.

6. Measure of Relief.—In actions on contract, where the contract furnishes no guide for the measure of the recovery, the summons must be for relief. (*Clor v. Mallory*, 1 *Code R.* 126; *Flynn v. Huds. Riv. R.R. Co.*, 6 *How. Pr.* 308; S.C., 10 *N.Y. Leg. Obs.* 158; *Hewitt v. Howell*, 8 *How. Pr.* 346; disapproving *Williams v. Miller*, 4 *Id.* 94; S.C., 2 *Code R.* 55; *Leopold v. Poppenheimer*, 1 *Code R.* 39.) To the contrary was, also, *Trapp v. N.Y. and Erie R.R. Co.*, 6 *How. Pr.* 237; S.C., 1 *Code R. (N.S.)* 384.

7. Place.—The summons must state *where* the application for relief will be made. (*Warner v. Kenney*, 3 *How. Pr.* 323; S.C., 1 *Code R.* 96.) The cause of action stated in the complaint should control the form of the notice in the summons, and it is the summons which is to be set aside if the complaint belongs to a different class of actions. (6 *How. Pr.* 439; *Voorhies v. Scofield*, 7 *How. Pr.* 51; *Boughton v. Lapham*, 14 *How. Pr.* 360; *Shafer v. Humphrey*, 15 *How. Pr.* 564.) But where the complaint contains the appropriate prayer for relief, the defendants cannot be deemed misled. (*Baxter v. Arnold*, 9 *How. Pr.* 445.) As to setting aside complaint for variance, see, further, *Campbell v. Wright*, 21 *How. Pr.* 9.

*No. 801.**Summons in Tax Suit.*

State of California, City and County of	}	In the District Court Judicial District.
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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs.	}
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against

DOE G., No., JOHN DOE, RICHARD ROE, and the Real Estate and Improvements herein described, Defendants.	}
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And also the following real estate and improvements, to wit: That certain piece or parcel of land situated in said State and County, known and described as Lot No., in the Block bounded by and and and Streets, in the City of, in the County of, in said State, and all and every part and parcel of the improvements on said land, Defendants.

The people of the State of California send greeting:

To each of the above named defendants, and all owners and claimants of the property above described:

You are hereby required to appear in an action brought against you by the above named plaintiffs, in the District Court of the Judicial District of the State of, in and for the County of, and to answer the complaint filed therein (a copy of which accompanies this summons), within ten days (exclusive of the day of service) after the service on you of this

summons, if served within County; if served out of County, but within Judicial District, within twenty days; or if served out of said District, then within forty days; or judgment by default will be taken against you.

The said action is brought to recover the sum of dollars due from said defendant for the State and County taxes levied and assessed for the fiscal year A.D. 18 . . , and damages, and the costs of this suit (of which tax dollars was so levied and assessed on the property above described, and is a lien thereon), and to obtain a decree of the said Court for the foreclosure of said lien upon said premises; that the said premises may be sold, and the proceeds applied to the payment of said taxes, damages and costs, and to obtain execution against said defendants for the payment of the same, and also, that all persons claiming any interest, either legal or equitable in said premises, may be barred and foreclosed of all right, title, equity of redemption, and interest therein.

And if you fail to appear and answer said complaint, as above required, the plaintiff will take default against you, and take judgment for the said sum of dollars, and the damages and costs aforesaid, and apply to the Court for the relief demanded in the complaint.

GIVEN under my hand, and the
 seal of the District Court of the
 Judicial District, this
 day of , in the
 year of our Lord 18 . .

A. B.,
Clerk.

By C. D.,
Deputy Clerk.

NOTE.—This is under the peculiar practice in California outside of San Francisco, where taxes are collected by suit, and this may be done by proceedings *in rem*, or against the *person* and *property*, or against the *person* only.

No. 802.

Statement of Cause of Action for Foreclosure of Mortgage.

[TITLE.]

The people of the State of California send greeting:

To, defendant:

[*Commencement as in Form No. 797.*]

The said action is brought to obtain a decree of this Court for the foreclosure of a certain mortgage described in the said complaint, and executed by the said, on the day of, 18.., to secure the payment of a certain promissory note, dated on the day of, 18.., made by said, for the sum of dollars, payable in gold coin of the United States, [three] months after the date thereof, to the order of said, with interest thereon, at the rate of per cent. per month. That the premises conveyed thereby may be sold, and the proceeds applied to the payment of the sum of dollars, due on said note, together with interest thereon, from to, at per cent. per month, [besides counsel fees upon the amount of principal and interest due on said note, at the rate of per cent.], also for the costs, expenses and disbursements of said suit, and in case such proceeds are not sufficient to pay the same, then to obtain an execution against the said for the balance remaining due, and also that the said defendant, and all persons claiming by, through,

or under him, may be barred and foreclosed of all right, title, claim, lien, equity of redemption, and interest in and to such mortgaged premises, and for other and further relief. And if you fail to appear and answer the said complaint, as above required, the plaintiff will take default against you, and apply to the Court for the relief demanded in said complaint.

[*Attestation Clause, Date, and Signature.*]

No. 803.

Return of Sheriff on Summons—General Form.

[STATE AND COUNTY.]

[COURT.]

Office of the Sheriff, City and]
County of

I hereby certify that I received the within summons on the day of, 18..., and personally served the same on the day of, 18..., by delivering to [*names*], said defendants personally, in the City and County of, a copy of said summons attached to a certified copy of the complaint in said action therein named.

G. H.,

Sheriff.

By J. K.,

Deputy Sheriff.

Dated at, this day
of, 18...

8. Defective Service.—Where judgment of foreclosure was obtained on such service, and the premises sold under the judgment to a party who was, at the time of such purchase, cognizant of the fact of such defective service, and, also, that the defendant was a married

woman, and where the defendant has a valid defense to such action, the judgment will be set aside. *McMillan v. Reynolds*, 11 *Cal.* 372.

9. Deputy.—The general rule of the common law is that officers who exercise judicial functions cannot act by deputy, but those who exercise merely ministerial functions may, without express authority to that effect. (*Jobson v. Fennell*, 35 *Cal.* 711.) In the absence of statutory provisions as to the appointment of deputies by constables, the common law rule applies, and constables may act by deputy in the exercise of their ministerial functions. (*Id.*) Courts cannot know an under officer, and the act and return on a summons of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. (*Joyce v. Joyce*, 5 *Cal.* 449.) A summons was served by the deputy sheriff, and returned, with the following signature to the return: Elijah F. Cole, D. S. Judgment was rendered by default. *Held*, that the judgment was null and void; the return should have been made in the name of the sheriff by the deputy. *Rowley v. Howard*, 23 *Cal.* 401.

10. Description of Land.—A description in a Sheriff's return of city lots, by numbers referring to the official map, is sufficient. *Welch v. Sullivan*, 8 *Cal.* 186.

11. On Clerk.—An affidavit of service on a clerk must state that he was in the attorney's office at the time. (*Jackson v. Giles*, 3 *Cal. R.* 88; *Paddock v. Beebe*, 2 *Johns. Cas.* 117.) But it need not specify the name of the clerk. *Tremper v. Wright*, 2 *Cal. R.* 101.

12. On Corporations.—Where the return of the Sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company," it was not sufficient evidence of service to give the Court jurisdiction, it not appearing that Street was president, or head of the corporation, or secretary, cashier, or managing agent thereof. (*O'Brien v. Shaw's Flat and Tuolumne Canal Co.*, 10 *Cal.* 343.) A sheriff's return that he served the summons on the president and secretary of the company, is *prima facie* evidence that the persons named in the return were such officers. *Rowe v. Table Mountain Water Co.*, 10 *Cal.* 441.

13. On Partners.—The return of a sheriff that he served the summons on one Pendleton, one of the partners and associates of the company, is *prima facie* evidence that Pendleton was such partner and

associate. (*Willson v. Spring Hill Quartz Mining Co.*, 10 *Cal.* 445.) Where the summons was issued against Adams & Co., and served on C. B. Macy, and nothing appeared to connect Macy with Adams & Co., judgment by default could not be sustained. *Adams v. Town*, 3 *Cal.* 247.

14. Presumptions.—Courts should presume that the Sheriff served all processes within his jurisdiction, where no place of service is stated. (*Crane v. Brannan*, 3 *Cal.* 192.) Where the return of a sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the Clerk, and not by some one else. (*Curtis v. Herrick*, 14 *Cal.* 117.) A sheriff's return is not traversable, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion. *Egery v. Buchanan*, 5 *Cal.* 56.

15. Time and Place.—In case of service, otherwise than by publication, the certificate or affidavit shall state the time and place of the service. (*Cal. Pr. Act*, § 34; *N.Y. Code*, § 138.) The only object of the designation of the place where process is served is to determine the period within which the answer must be filed, or when default may be taken. (*Whitwell v. Barbier*, 7 *Cal.* 62; *Alderson v. Bell*, 9 *Cal.* 315.) Where the evidence of place of service is insufficient, advantage of it should be taken, either by appeal, or on motion to vacate the judgment. *Pico v. Suñol*, 6 *Cal.* 294.

16. Where one Defendant was not Found.—I further certify that I have made diligent search for the defendant A. B. named in said summons, but have been unable to find him within my said County.

No. 804.

Affidavit of Service of Summons upon Several Defendants.

[TITLE.]

State of California,
 City and County of } ss.

A. B., being duly sworn, deposes and says:

I received the annexed summons in the above entitled cause on the day of, 18. ., and on the day of, 18. ., personally served the same, by delivering to C.D., one of said defendants, personally, in the City and County of San Francisco, a copy of said summons, attached to a certified copy of the complaint in the above entitled cause, and by leaving the same with him, and also, on the day of, 18. ., by delivering to E.F., one of said defendants, personally, in the City and County aforesaid, a copy of said summons, and also, personally, on the day of, 18. ., by delivering to G. H., one of said defendants, in the City and County of San Francisco, a copy of said summons; and I further depose that each of said defendants was, on said mentioned days, resident of the said City and County of San Francisco; and I further depose that I am a white male citizen of the United States, over twenty-one years of age, and competent to be a witness upon the trial of the above entitled cause, and that I was such citizen and was so competent on the several days herein named.

Subscribed and sworn to, etc.

*No. 805.**Affidavit of Service by Person not Officially Appointed.*

[TITLE.]

County of, ss.

A. B., being duly sworn, deposes and says:

I am, and was at the time of service of summons herein-after mentioned, a white male citizen of the United States, over twenty-one years of age, and competent to be a witness on the trial of this action; that on the . . . day of, 18.., I served the summons in the above entitled action on the defendant C.D., at the City and County of San Francisco, by delivering to and leaving with said defendant a copy of said summons, and a copy of the complaint filed in this action, certified by the Clerk of said Court.

Subscribed and sworn to, etc.

A. B.

17. Affidavit must Show.—The affidavit of service of summons, required by the 28th section of the Practice Act, must show that the person serving it was a white male citizen, over twenty-one years of age, competent to testify in the cause, and that a certified copy of the complaint accompanied the summons. *McMillan v. Reynolds*, 11 *Cal.* 378.

18. Effect of Defective Affidavit.—Failure to state in the affidavit that the facts constituting competency existed at the day of service, it appearing that they existed at the time of making the affidavit, does not invalidate the judgment when attacked collaterally—it is a mere irregularity. *Peck v. Straus*, 33 *Cal.* 678.

19. Mode, Time and Place.—The proof of the former mode of service, if made by an officer, is by his affidavit or certificate, set-

ting forth the mode, time, and place of such service; if made by a citizen, then by his affidavit setting forth said facts, and in addition, the facts constituting his said qualifications. Proof of the latter mode of service is by the affidavit of the printer, his foreman or principal clerk, setting forth the fact where and how long the publication of summons has been made, and where a deposit in the post office had been ordered, then an affidavit showing such deposit. (*Hahn v. Kelly*, 34 *Cal.* 391,) The affidavit must show affirmatively compliance with all the requirements of law. *McMillan v. Reynolds*, 11 *Cal.* 378.

20. Residence of Defendant.—If the affidavit of service of summons states the county in which the service was made, and defendant makes default, it will be presumed that he was a resident of the county where service was made. *Calderwood v. Brooks*, 28 *Cal.* 151.

21. Sufficient Affidavit.—And if the affidavit state the facts constituting affiant a competent witness, it is sufficient without stating that he is competent. *Dimick v. Campbell*, 31 *Cal.* 238.

No. 806.

Affidavit for Publication of Summons.

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above entitled action. The complaint in said action has been duly filed with the Clerk of this Court, and summons thereupon issued; and the said action is brought for the purpose of [*state the purpose of the action*].

II. The defendant C. D. last resided at the City and County of, but he has departed from this State, and now resides at, in the County of, State of Nevada. [*Or*, That the last known

place of residence of said defendant, C. D., was at, within this State, but that he removed thence on or about the day of, 18.., and his residence at this time cannot with due diligence be ascertained. I have diligently made such inquiry of and, his former neighbors and acquaintances, and of, his wife, and of his father and brother, who reside at the said City and County of, and I am informed by them that they are ignorant of defendant's residence, but that he is not, as they believe, within this State.]

III. That a summons was duly issued out of this Court to the Sheriff of the City and County of, with directions to said Sheriff to serve the same upon said defendant, and the said Sheriff has returned the same to the Clerk of this Court, with his return thereon indorsed, to the effect that the said defendant could not be found in his county [*or state particulars of the return*].

IV. I have fully and fairly stated the facts of the case to E. F., of No., Street, in the City of San Francisco, my counsel, and I am by him informed and I verily believe that I have a good cause of action in this suit against the said defendant, and the said defendant C. D. is a necessary and proper party defendant thereto, as I am advised by my said counsel, after such statement made as aforesaid, and as I verily believe.

V. Personal service of said summons cannot be made on the said defendant, and I therefore demand an order that service of the same may be made by publication.

A. B.

[*Jurat.*]

22. Affidavit Essential.—Before jurisdiction of a defendant can be acquired by publication of summons, it must appear by affidavit, either that the defendant *resides out of the State*, or has *departed from the State*, or *cannot* after due diligence be *found within the State*, or that he *conceals himself* to avoid the service of summons, and in addition thereto it *must also appear* by affidavit, that a *cause of action* exists against the defendant, or that he is a *necessary or proper party*. Braly *v. Seaman*, 30 Cal. 610.

23. Affidavit must Show.—The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and, if known, the residence must be stated. (*Ricketson v. Richardson*, 26 Cal. 149; Braly *v. Seaman*, 30 Id. 610; Hyatt *v. Wagonright*, 18 How. Pr. 248; Cook *v. Farren*, 34 Barb. 95; 12 Abb. Pr. 359; 11 Id. 40.) It must show compliance with all the requirements of the law. (*McMillan v. Reynolds*, 11 Cal. 372.) Nor is it sufficient merely to repeat the language or substance of the Statute. (*Ricketson v. Richardson*, 26 Cal. 149.) An affidavit in such case must state facts which show that due diligence to find the defendant has been used, and it must also appear therefrom that the diligence has not been rewarded with a discovery. Braly *v. Seaman*, 30 Cal. 610; Forbes *v. Hyde*, 31 Cal. 342.

24. Evidence must be Conclusive.—Where the affidavit for publication of summons presents some evidence tending to prove each jurisdictional fact, but of a character clearly too inconclusive to justify an order of publication, the order is erroneous, and the judgment will be reversed on appeal; but it is not void. (Forbes *v. Hyde*, 31 Cal. 342.) If there is a total want of evidence upon which to base the order, the judgment is void. (Forbes *v. Hyde*, 31 Cal. 342.) In the former case, the judgment cannot be attacked collaterally, but only on appeal. Forbes *v. Hyde*, 31 Cal. 342.

25. Facts Set Out.—Facts should be set out in an affidavit for an order to publish summons, and not a general expression of opinion or belief that an ultimate jurisdictional fact exists, without the probative facts upon which such opinion or belief is founded. Forbes *v. Hyde*, 31 Cal. 342; Collins *v. Ryan*, 32 Barb. 647; Roche *v. Ward*, 7 How. Pr. 416; Tousley *v. McDonald*, 32 Barb. 604.

26. Insufficient Affidavit.—An affidavit to obtain an order for publication of summons, which states that the deponent “has a good

cause of action in this suit against the said defendant, and that he is a proper party defendant thereto as he verily believes," does not state any fact tending to show a cause of action, and an order and publication based on it are void. (*Forbes v. Hyde*, 31 *Cal.* 342; *Sharp v. Daugney*, 33 *Cal.* 515; *Sharp v. Lumley*, 34 *Id.* 616; *Hahn v. Kelly*, 34 *Cal.* 391.) An affidavit for publication on the ground of the absence of the defendant, which states that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of F., who is an intimate friend of defendant, as to his whereabouts; that F. was unable to inform him; and that plaintiff did not know where defendant could be found within the State, was held insufficient. (*Swain v. Clare*, 12 *Cal.* 283) It is not sufficient to state generally in such affidavit that, after due diligence, the defendant cannot be found within the State, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party should be stated. (*Ricketson v. Richardson*, 26 *Cal.* 152; *Warren v. Tiffany*, 9 *Abb. Pr.* 66; 17 *How. Pr.* 106.) It must appear either that the defendant resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or that he conceals himself to avoid the service of summons; and in addition thereto, it must also appear by affidavit, that a cause of action exists against the defendant, or that he is a necessary or proper party. (*Braly v. Seaman*, 30 *Cal.* 610.) It must be proved that the *person to be served* cannot, after due diligence, be found in the State. (*Hurlburt v. Hope Mut. Ins. Co.*, 4 *How. Pr.* 278; *Wortman v. Watman*, 17 *Abb. Pr.* 66; *Irving Savings Institute v. Hardman*, 17 *Abb. Pr.* 67.) The affidavit being insufficient, the Court acquires no jurisdiction over the defendant, and the judgment is void; (*Braly v. Seaman*, 30 *Cal.* 610; *Swain v. Chase*, 12 *Id.* 283; *Forbes v. Hyde*, 31 *Id.* 342;) as the affidavit is only *prima facie* evidence of the facts stated therein. *Ware v. Robinson*, 9 *Cal.* 111.

27. On Infant.—The requirements of the Statute being positive, that in actions against a minor under the age of fourteen years, personal service of summons must be made, in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication. *Gray v. Palmer*, 9 *Cal.* 616.

28. Presumption.—The affidavit and orders referred to form no part of the judgment roll; and it is a matter of no consequence whether

the jurisdiction of the court appears affirmatively upon the judgment roll or not, for if it does not, it will be conclusively presumed when the judgment is collaterally attacked. *Hahn v. Kelly*, 34 *Cal.* 391.

29. Sufficient.—Where the attorney of record makes an affidavit that diligent search has been made for the defendant, and that he conceals himself to avoid service of process, it is sufficient for an order for the service of summons to be made by publication. (*Anderson v. Parker*, 6 *Cal.* 201; *Towsley v. McDonald*, 32 *Barb.* 604.) As to insufficiency of affidavit on these points, see (*Swain v. Chase*, 12 *Cal.* 283; *Goodkin v. Redgate*, 1 *Cr. & J.* 401.) An affidavit which avers a cause of action against the defendant, that defendant cannot after due diligence be found in the State, that summons has been issued, but sheriff cannot find him, that defendant's residence is in the County where the summons issued, and that defendant still has a family residing in said County, is sufficient to authorize the Court to appoint an attorney to represent such absent defendant. *Jordan v. Giblin*, 12 *Cal.* 100.

No. 807.

Order for Publication of Summons.

[TITLE.]

Upon reading and filing the affidavit of A. B., and it satisfactorily appearing therefrom to me, the Judge of the District Court of the Judicial District of the State of, in and for the County of, that the defendant C. D. resides out of this State, and cannot, after due diligence, be found therein [*or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of summons, as the case may be*], and it appearing from the affidavit aforesaid that a cause of action exists in this action in favor of the plaintiff therein, and against the said defendant, and that the said defendant C. D. is a neces-

sary and proper party defendant thereto; and it further appearing that a summons has been duly issued out of said Court in this action, and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained, and by the said affidavit made to appear: On motion of E. F., Esq., attorney for the plaintiff, it is ordered that the service of the summons in this action be made upon the defendant by publication thereof in the, a newspaper published at, hereby designated as the newspaper most likely to give notice to said defendant; that such publication be made at least once a week for three months.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known to be at the City of, in the County of, in the State of, it is ordered that a copy of the summons and a certified copy of the complaint in this action be forthwith deposited in the post-office, post paid, directed to the said defendant, at his said place of residence.

J. D., Judge of the District Court
of the Judicial District
for the County of, State
of

[DATE.]

30. Order must State.—The order must state the facts proved by the affidavit upon which it is based. (*Ricketson v. Richardson*, 26 *Cal.* 149.) It is not sufficient for the order to state generally; that the defendant resides out of the State, or cannot after due diligence be found within the State, or that a cause of action exists against the defendant. *Ricketson v. Richardson*, 26 *Cal.* 152.

31. Order Insufficient.—Where, after complaint filed, and before

any summons was issued, an order was obtained from the Judge that "summons do issue," and that it be published, and without any further order summons was subsequently issued and published: *Held*, that the attempt thus to acquire jurisdiction of the defendant was ineffectual, and that a judgment rendered against him by default, without any other service of process, was void. (*People v. Huber*, 20 *Cal.* 81.) The question of the sufficiency of an affidavit and order for publication of summons may be raised by motion made in the suit, or by an appeal supported by a statement. (*Sharp v. Dangney*, 33 *Cal.* 505.) An order to publish a summons made in advance of the issuance of the summons is a nullity. *People v. Huber*, 20 *Cal.* 81.

32. Power of Judge.—The Judge has no power to order a summons to issue, but only to order a summons already issued to be served in a special manner. (*McMinn v. Whelan*, 27 *Cal.* 304; *Forbes v. Hyde*, 31 *Id.* 342.) The Court acts judicially in granting the order, and can know nothing about the facts upon which it is granted, except from the affidavit. *Ricketson v. Richardson*, 26 *Cal.* 149.

33. What Order must Direct.—An order for the publication of a summons, which presupposes that the debtor is a resident of the State, but has departed therefrom, or keeps himself concealed therein, must direct a copy of the summons and complaint to be deposited in the post office, directed to the defendant at his place of residence, though it appear from the affidavit that he has departed therefrom. *Jowsley v. McDonald*, 32 *Barb.* 604.

No. 808.

Affidavit of Publication.

[TITLE.]

[VENUE.]

A. B., of said County, being duly sworn, deposes and says as follows:

I. I am a white male citizen of the United States, over twenty-one years of age, and am competent to be a witness on the trial of the above entitled action.

II. I am the principal clerk and book-keeper in the office of the Daily, a newspaper printed and published in the City and County of [*or* printer, foreman, *or* principal clerk].

III. The summons of which the annexed is a printed copy, was published in said newspaper at least once a week for three months, commencing on the . . . day of, 18.., and ending on the . . . day of, 18..

[SIGNATURE.]

[*Jurat.*]

NOTE.—It will be observed that many of the affidavits herein are made in the first person. This mode is the universal English practice, and is recommended by the Code Commissioners of the State of New York, and I here take the liberty of recommending it to the profession, as it certainly appeals more directly to a man's conscience than if made in the third person.

31. By Whom Made.—Where the affidavit was made by a publisher and proprietor, and not by the printer, foreman, or chief clerk, it was *held* sufficient, as being within the spirit of the Statute. (*Sharp v. Daugney*, 33 *Cal.* 505.) When service is had by publication, proof thereof can only be made by affidavit of the printer, his foreman or clerk; and the affidavit should state that the person taking the same holds one of these positions. (*Steinback v. Leese*, 27 *Cal.* 295.) And there being but one clerk in the office of the newspaper, and the affidavit describing him as principal clerk, the affidavit was held sufficient. *Gray v. Palmer*, 9 *Cal.* 616.

32. Presumption.—If the affidavit does not show facts sufficient to give jurisdiction, but the judgment in the recitals supplies those facts, or recites that service had been had upon the defendant, the judgment will control. It will be presumed that other evidence than that contained in the judgment roll was made. The recital imports absolute verity. *Hahn v. Kelly*, 34 *Cal.* 391.

33. Sufficiency of.—An affidavit commencing, “A. B., principal clerk, etc., being sworn, deposes,” etc., was held insufficient in (*Steinback v. Leese*, 27 *Cal.* 295.) He should swear that he *is principal* clerk in direct and positive terms.

No. 809.

Affidavit of Service by Mail of Summons and Copy of Complaint.

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, deposes and says as follows:

I. [I am a white male citizen of the United States, over twenty-one years of age, and am competent to be a witness on the trial of the above entitled action.]

II. On the day of, 18 . . . , the complaint in the said action was filed, and afterwards an order was made by the Court for the publication of the summons in the said action, and also a further order that a certified copy of said complaint and a copy of the said summons should be deposited in the post office, and directed to the defendant in said action, at his place of residence, to wit: at the City of, in the County of, State of; that afterwards, to wit: on the day of, 18 . . . , and in pursuance of the said order of the Court in the premises heretofore made, I deposited in the post office at the City of a copy of the said summons, attached to a copy of the said complaint, certified by the Clerk of said Court, directed to C. D., the said defendant, at the City of, in the

County of, State of, the place of his residence as aforesaid, and paid the postage thereon.

[SIGNATURE.]

[*Jurat.*]

35. Statement in Affidavit.—The affidavit of deposit of summons in post office need not state that the deposit was made by a white male citizen, or that the affiant is such citizen. It is sufficient if the deposit and affidavit are made by a human being. (*Sharp v. Daugney*, 33 *Cal.* 505.) Nor is it necessary to state that there is a communication by mail between the place of deposit and the place to which the packet was addressed, nor that the post office was a United States post office. *Id.*

No. 810.

Admission of Service.

[TITLE.]

I admit [due and] personal service of the within upon me, made this day of, 18.., at

[SIGNATURE.]

36. Date.—Where defendant's attorneys accepted service of summons, but attached no date thereto, the date of the return by the Sheriff was held to be the true date of the service. When the place where the writ is served is not stated, the Court should assume that it was served within the jurisdiction of the officer to whom it was directed. *Crane v. Brannan*, 3 *Cal.* 192.

37. Judicial Notice.—Courts will take judicial notice of the signatures of their officers as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions to be available in the action should be accompanied with some evidence of the genuineness of the signatures

of the parties; in the absence of such evidence, the Court cannot notice them. *Alderson v. Bell*, 9 *Cal.* 315.

33. Must be in Writing.—An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient. *Montgomery v. Tutt*, 11 *Cal.* 307.

CHAPTER III.

APPEARANCE.

1. It is provided by statute that after the filing of the complaint a defendant in the action may appear, answer or demur, whether the summons has been issued or not; and such appearance, answer or demurrer shall be deemed a waiver of summons. (*Cal. Pr. Act*, § 22; *Code of Oregon*, § 59; *Wash. T.* § 40; *Arizona*, § 22; *Idaho*, § 22; *N.Y. Code*, § 127; *Swan's Ohio Pl.* 22.) A voluntary appearance by a defendant gives jurisdiction without issuance of summons; (*Cal. Pr. Act*, § 35; *Hayes v. Shattuck*, 21 *Cal.* 51; *Carrington v. Bents*, 1 *McLean*, 174; *Shields v. Thomas*, 18 *How. U.S.* 253;) as the only object of the summons is to bring a party into court, and if that object is obtained without issuance or service, there can be no injury to the defendant. (*Smith v. Curtis*, 7 *Cal.* 587.) So, a guardian may waive process, and enter his appearance for his ward. *Springer v. Litherberry*, 4 *McLean*, 442.

2. Appearance covers all defects and irregularities in process, and the want of service. (2 *Stra.* 1,072; 4 *Cranch*, 180; 3 *Cranch*, 498; *McCoy v. Lemons*, *Hempst.* 216; see *Pollard v. Dwight*, 4 *Cranch*, 421;

The "Merino," 9 *Wheat.* 391; *Flanders v. Ætna Ins. Co.*, 3 *Mass.* 158; *Segee v. Thomas*, 3 *Blatchf.* 11; *Harrison v. Rowan*, 1 *Pet. C. Ct.* 489.) See, as to appearance in case of foreign attachment, (*Toland v. Sprague*, 12 *Pet.* 300.) See, in case of an absent defendant, (*Shields v. Thomas*, 18 *How. Pr.* 253.) A general appearance not only waives defects in a writ or summons, but gives jurisdiction over the person in cases where the writ was void. *State v. McCullough*, 3 *Nev.* 202; *Farrar v. United States*, 3 *Pet.* 459; *Pollard v. Dwight*, 4 *Cranch*, 421.

3. But appearance does not cure a substantial defect in the writ of error (such as naming a return day for the writ), or an omission to file a transcript of the record at the term next succeeding the issuing of the writ or the taking of the appeal. (*Carroll v. Dorsey*, 20 *How. U.S.* 204.) Nor does it preclude a party from moving to dismiss for the want of jurisdiction, or any other sufficient ground, except for want of a citation, or for mere irregularity in its service. (*United States v. Yates*, 6 *How. U.S.* 605.) A notice given by an attorney to plaintiff's attorney, that the defendant will move before a court commissioner that an attachment issued in the case be dissolved, does not constitute an appearance in the action. (*Glidden v. Packard*, 28 *Cal.* 649.) So, when a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect. (*Deidesheimer v. Brown*, 8 *Cal.* 339.) Nor does he waive his rights by answering after moving to dismiss, and motion overruled. *Id.*

4. A defendant shall be deemed to appear in an

action, when he answers, demurs, or gives the plaintiff a written notice of his appearance, or when an attorney gives notice of appearance for him. (*Cal. Pr. Act*, § 523.) The filing of a general demurrer is an appearance, and cures any defect in service of process. (*Williams v. Miller*, *Sup. Ct. Wash. Terr.*, 1864, p. 106.) A defendant cannot appear in an action so as to give the court jurisdiction of his person, except by answering or demurring or giving plaintiff written notice that he appears. (*Steinback v. Leese*, 27 *Cal.* 297.) Where the record shows, in general terms, the appearance of parties, the appearance will be confined to those parties served with process. *Chester v. Miller*, 13 *Cal.* 558; *Kelly v. Van Austin*, 17 *Id.* 564; *Hinchfield v. Franklin*, 6 *Cal.* 607.

5. An action was brought in a court, the judge of which was disqualified from hearing the case on account of relationship to one of the defendants. Some of the other defendants not appearing, the clerk entered a default against them. *Held*, that the entry of the default, being a ministerial act, was rightly made. (*The People v. De Carillo*, 35 *Cal.* 37.) If it does not appear affirmatively upon the face of a record of a court of general jurisdiction that the Court had jurisdiction of the defendant, that fact will be presumed, unless the record shows affirmatively that no jurisdiction was acquired. (*Carpentier v. City of Oakland*, 30 *Cal.* 439.) And it can be shown only by the record. *Id.*

TIME WITHIN WHICH TO ANSWER.

6. In California, a party has ten days to answer after service of summons, if served in the county;

twenty days, if out of the county but within the judicial district; and forty days in all other cases. (See *Cal. Pr. Act*, § 25; *Grewell v. Henderson*, 5 *Cal.* 465.) A non-resident of the State comes under the latter clause. (*Id.*) Where a summons is made returnable in thirty instead of forty days, and did not state that judgment by default would be taken unless defendant appeared and answered, nor specify the amount for which judgment would be taken, the summons would not support a judgment by default. (*People v. Woodlief*, 2 *Cal.* 241.) And where defendants were cited to appear and answer in the court of first instance at 10 o'clock, and judgment was rendered against them at 9 o'clock: *Held*, that judgment was irregular, and should be reversed. (*Parker v. Shephard*, 1 *Cal.* 131.) Where the first clause of a summons requires the defendant to appear and answer within forty days, and the concluding clause notifies him that if he does not answer in twenty days a default will be taken, it is too contradictory or uncertain to require an appearance and answer within the shorter period. *Kidd v. Four-Twenty*, 3 *Nev.* 381.

No. 811.

Notice of Appearance.

State of California,	}	In the District Court,
City and County of Judicial District.

A. B., Plaintiff,	}
<i>against</i>	
C. D., Defendant.	

E. F. Esq., Attorney for Plaintiff A. B.

SIR:

Please take notice that the defendant C. D. hereby appears in this action by the undersigned, his attorney.

G. H.,

Atty. for Deft.

[DATE.]

7. Appearance.—A party to an action may appear in his own person or by attorney, but he cannot do both; and if he appears by attorney, he cannot assume the control of the case. (Board of Commissioners *v.* Younger, 29 *Cal.* 147.) While an attorney of record remains such, his right to manage and control the action cannot be questioned by the opposite party. (Board of Commissioners *v.* Younger, 29 *Cal.* 147.) It is contempt for a party to refuse to obey or answer the writ, on the ground that he is a witness attending on another court. *Page v. Randall*, 6 *Cal.* 32.

8. Appearance by Attorney.—Under our practice, at any time after the commencement of an action, any one or all of the defendants may appear by attorney without service of summons, and the defendant so appearing must plead to the action within the same time thereafter as he would had the summons been served upon him. An appearance entered by attorney whether authorized or not, is a good and sufficient appearance to bind the party. (*Suydam v. Pitcher*, 4 *Cal.* 280; *Holmes v. Rogers*, 13 *Cal.* 191; *Turner v. Carruthers*, 17 *Id.* 431.) Appearance by attorney, whether authorized or not, at common

law, and by express letter of our Statute, is a waiver of service. (*Suydam v. Pitcher*, 4 *Cal.* 280.) And a waiver of all defects in summons or previous proceedings. (*Webb v. Mott*, 6 *How. Pr.* 440; *Dix v. Palmer*, 5 *Id.* 233; 3 *N.Y. Code R.* 214; *Dole v. Mauley*, 11 *How. Pr.* 138; *Hyde v. Patterson*, 1 *Abb. Pr.* 248; *Bierce v. Smith*, 2 *Id.* 411.) And of all irregularity in the original process. (*Knox v. Summers*, 3 *Cranch*, 496; *Gracie v. Palmer*, 8 *Wheat.* 699.) If an attorney appears for a defendant in a court of general jurisdiction, this appearance gives the court jurisdiction of the person of defendant; and if the attorney appeared without authority, that fact cannot be shown as a defense at law, in a suit upon the judgment. *Carpentier v. City of Oakland*, 30 *Cal.* 439.

9. Appearance by Mistake.—If an attorney appears for a part only of defendants, and inadvertently answers for all, and obtains leave of court to withdraw his answer, and substitute a new one answering for the party only for whom he appears, the court acquires jurisdiction only of those for whom he appears. *Forbes v. Hyde*, 31 *Cal.* 342.

10. Attorney's Authority to Appear.—Attorneys are officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in the proceedings only by the license of the court. (*Clark v. Willett*, 35 *Cal.* 534.) And his license is *prima facie* evidence of his authority to appear for the person whom he professes to represent; but if the supposed client denies his authority, the Court may require him to produce the evidence of his retainer, either upon the direct application of the person represented, or upon motion of the attorney of the opposite party to dismiss, founded upon the affidavit of the person or party concerning whom the motion is made. (*Clark v. Willett*, 35 *Cal.* 534.) The practice of permitting appearance without producing a warrant of attorney is as applicable to appearance for a corporation as for a natural person. *Osborn v. Bank of United States*, 9 *Wheat.* 738.

11. Attorney's Authority Presumed.—An attorney of the court, who institutes suit in the name of plaintiff, is presumed *prima facie* to have authority, and the adverse party or his attorney cannot, upon mere suggestion at the bar, deny the right of a party to appear by the attorney of record, nor deny that the attorney so appearing has full authority to prosecute the suit. (*Turner v. Caruthers*, 17 *Cal.* 431.)

The authority of an attorney at law to appear for parties for whom he enters an appearance in an action, will be presumed where nothing to the contrary appears. (*Hayes v. Shattuck*, 21 *Cal.* 51; *Wilson v. Cleveland*, 30 *Cal.* 192; *Holmes v. Rogers*, 13 *Cal.* 191.) It seems that the appearance of an attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give the party a right to assail the judgment on that ground. *Id.*

12. Concealed Defendant.—The Court may appoint an attorney for an alleged concealed defendant, and a judgment against him will stand after six months have elapsed, unless he filed his bill to set aside the judgment on the ground of fraud, that he was not concealed. (*Ware v. Robinson*, 9 *Cal.* 107.) The provisions of the Practice Act, authorizing judgment against an absent defendant, for whom the Court has appointed an attorney, with privilege to the defendant to come in and deny in six months, is not in violation of the Constitution of the United States, or that of this State. *Ware v. Robinson*, 9 *Cal.* 107.

13. Counties—Suits by and against.—Boards of supervisors have power to employ other counsel than the District Attorney to assist in or to conduct the prosecution or defense of any suit to which the County is a party, which power extends equally to suits to which she is a party upon the record, and to those in the prosecution or defense of which she has or is supposed to have some interest. The judgment and discretion of the Board in the exercise of this power are not open to review by the courts. *Hornblower v. Duden*, 35 *Cal.* 664.

14. Partners.—To a libel against three partners, one appeared and put in a plea in behalf of himself and his co-partners, to which the plaintiff replied as to a plea of the firm, and the rejoinder was signed by the "proctor for the defendants." *Held*, a sufficient legal appearance of all the defendants to sustain the judgment against them. *Hills v. Ross*, 3 *Dall.* 331.

15. Signature of Attorney.—If the answer has the signature of the attorney of record and that of an associate attorney attached to it, the Court will not strike it out. The Court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority. (*Wilson v. Cleveland*, 30 *Cal.* 192.) It is well settled that Courts will take judicial cognizance of the signatures of their officers as such; but there is no rule which

extends such notice to the signature of the parties to a cause. *Hahn v. Kelly*, 34 *Cal.* 391.

16. State.—In an action against a State, a demurrer signed by the Attorney-General, as such, he being a practitioner in the Court: *Held*, an appearance for the State. (*New Jersey v. New York*, 6 *Pet.* 323.) If the State shall neglect or refuse to appear upon due service of process, no coercive measures will be taken to compel appearance, but the plaintiff will be allowed to proceed *ex parte*. 3 *Dall.* 230; 2 *Id.* 419; *Massachusetts v. Rhode Island*, 12 *Pet.* 755; *New Jersey v. New York*, 5 *Id.* 284.

17. Stipulation of an Attorney.—An attorney at law for one of the parties, in a proceeding in a county court to determine conflicting claims to town lots, cannot, after the Board of Trustees of the town have awarded the lots to his client, pass the client's right or title by a stipulation in the case for the entry of a void judgment. *Ryan v. Tomlinson*, 31 *Cal.* 11.

CHAPTER IV.

NOTICE OF LIS PENDENS.

No. 812.

i. *Form of Notice.*

State of California,	}	In the District Court,
City and County of Judicial District.

A. B., Plaintiff,	}
against	
C. D., Defendant.	

Notice is hereby given that a suit has been commenced in said Court, by the above named plaintiff, against the above named defendant, which suit is now pending; that the object of said suit is to foreclose and

determine the lien of a certain mortgage, of date, executed by said defendant to said plaintiff, and recorded in the Recorder's office of said County of, in Liber of Mortgages, at page; and to foreclose the defendant's equity of redemption in and to the premises described in said mortgage. Said premises are described as follows, viz: [*insert description.*]

E. F.,

[DATE.]

Atty. for Plff.

1. Actual Notice.—Where, after the commencement of an action of ejectment against a tenant, he gave notice to his landlord, and requested him to defend, and the latter employed an attorney to conduct the suit, it was held that the actual notice given to the landlord was, as to him, equivalent to the filing of a *lis pendens*, and in an equal degree made the subsequent judgment obligatory upon him. *Sampson v. Ohleyer*, 22 Cal. 200.

2. Commencement of Suit as Notice.—The commencement of a suit in chancery is only constructive notice of the pendency of such suit, as against persons who acquired an interest under a defendant *pendente lite*. (*Stuyvesant v. Hall*, 2 Barb. Ch. 51.) The mere pendency of a suit, where the bill does not lay claim to any specific land, nor to all the land of defendant in a particular county or place, but asks merely for a discovery of any land in which he has invested money, is not a constructive notice of an equity in any particular piece of land held by defendant. (*Griffith v. Griffith*, 9 Paige, 315. The commencement of an equitable action by service of summons and injunction creates a *lis pendens* and a lien in the nature of an attachment, but the plaintiff is bound to prosecute diligently to retain the lien. (*Myrick v. Selden*, 36 Barb. 15.) Mere issuing of the subpoena is not sufficient to create a *lis pendens* as against a purchaser, without actual notice. Service is necessary, though it need not be personal. (*Hayden v. Bucklin*, 9 Paige, 512.) But filing a bill, and attempting to serve the subpoena, are sufficient against the defendant and a purchaser with notice. (*Weed v. Small*, 3 Sandf. Ch. 273; *Hayden v. Bucklin*, 9 Paige, 512.) Until the process is served in publication made, the doctrine of *lis pendens* does not apply. (*Games v. Dunn*, 14

Pet. 322; affirming S.C., 1 *McLean*, 321; to nearly same effect, *Fowler v. Byrd*, *Hempst.* 213.) But this cannot be the rule, except in those States where the action is commenced by service of summons. In California, the complaint precedes the summons, and the one must be filed, and the other issued, before the action is deemed commenced.

3. Actions to which it Applies.—Notice of *lis pendens* does not apply to actions of ejectment. It is confined to actions affecting the title to real property, and which operate directly upon the title, and by the result of which some change as to the title is wrought—as for example, actions for the condemnation of real estate, for the specific performance of contracts relating thereto, for the foreclosure of mortgages and other liens. (*Long v. Neville*, 29 *Cal.* 135; *Watson v. Dowling*, 26 *Cal.* 124.) It does not apply to actions of ejectment, but to proceedings in chancery to turn equitable into legal estates, or enforce liens on legal estates. (Same authorities.) The object of the notice is to give the opportunity of defense and also to notify third persons of the litigation. (*Richardson v. White*, 18 *Cal.* 102; *Sampson v. Ohleyer*, 22 *Id.* 200; *Horn v. Jones*, 28 *Id.* 194; *Sharp v. Lumley*, 34 *Id.* 612.) It does not apply to proceedings before a board of supervisors for condemnation of land for road purposes. *Curran v. Shattuck*, 24 *Cal.* 427.

4. Constructive Notice.—A *lis pendens* is constructive notice to a purchaser, and he and his interest will be bound by the decree entered in the suit. (*Harrington v. Slade*, 22 *Barb.* 161; *Sears v. Hyer*, 1 *Paige*, 483.) The only way to charge a purchaser of property pending a suit* with constructive notice of the suit is by filing a notice of *lis pendens* according to the Statute. (*Ault v. Gassaway*, 18 *Cal.* 205.) From the time of filing, only, shall the pendency of the action be constructive notice to a purchaser, or incumbrance of the property affected thereby. (*Cal. Pr. Act*, § 27; *N.Y. Code*, § 132.) This notice applies to parties to the action and purchasers under them subsequent to filing the notice. (*People v. Conolly*, 8 *Abb. Pr.* 128; *Chapman v. West*, 17 *N.Y.* 125.) And is as effectual as an injunction. *Stevenson v. Fayerweather*, 21 *How. Pr.* 449.

5. Creditor's Suit.—Where notice of the pendency of a suit against a conveyance in fraud of creditors has been filed, a conveyance of the property made since the filing of the bill cannot affect the complainant's rights. (*Beckman v. Montgomery*, 1 *McCarter, N.J.* 106.) A

creditor's bill, to be a *lis pendens*, must be so defined in the description of the estate as that any one reading it can learn thereby what property is the subject of litigation. *Miller v. Sherry*, 2 *Wall. U.S.* 237.

6. County Bonds.—A bill was filed enjoining a county from issuing bonds, and injunction was granted subsequently. A statute was passed authorizing the issue, and the issue was made. A year after the statute, another bill was brought to declare the bonds invalid, but they were decreed good. Two years after this decree, a bill of review was brought, and the former decree reversed. *Held*, that the bonds were not issued *pendente lite*. See *County v. Rogers*, 7 *Wall. U.S.* 181.

7. Effect of Lis Pendens.—Its effect is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment which may be rendered in the suit in which notice is given. (*Gregory v. Haynes*, 13 *Cal.* 594; *Curtis v. Sutter*, 15 *Id.* 263; *Haynes v. Calderwood*, 23 *Id.* 409; *Hurlbutt v. Butenop*, 27 *Cal.* 50.) And it abrogates the rule, making the mere pendency of an action *constructive* notice. (*Sampson v. Ohleyer*, 22 *Cal.* 200.) Our Statute does not give any new rights to the plaintiff, but limits rights which he had before. It simply adds to the common law rule a single term, to wit: to require for constructive notice, not only a suit, but filing notice for it; and there is no distinction, under the Statute, between different kinds of interest in or title to real estate. (*Richardson v. White*, 18 *Cal.* 102; *Sampson v. Ohleyer*, 22 *Id.* 200; *Horn v. Jones*, 28 *Id.* 194; *Hall v. Nelson*, 14 *How. Pr.* 32.) A notice of *lis pendens* duly prosecuted is notice to a purchaser, so as to affect and bind his interest by the decree. (*Murray v. Ballou*, 1 *Johns. Ch.* 566; *Skeel v. Spraker*, 8 *Paige*, 182; *Id.* 193; *Heathley v. Finster*, 2 *Johns. Ch.* 158; *Green v. Slayter*, 4 *Id.* 38; *Scudder v. Van Amburgh*, 4 *Edw.* 29.) Notice by *lis pendens* does not extend so as to affect those who claim under parties who were not parties to the litigation. (*Scarlett v. Gorham*, 28 *Ill.* 319.) A *lis pendens* does not operate as notice, unless the court has jurisdiction of the thing. *Carrington v. Brents*, 1 *McLean*, 167.

8. Effect of Neglect to File.—If notice of *lis pendens* be not filed, plaintiff cannot successfully set up that notice would have done no good to the purchaser, because he could make no defense, or no better defense than the vendor. (*Richardson v. White*, 18 *Cal.* 102; *Sampson v. Ohleyer*, 22 *Id.* 200; *Horn v. Jones*, 28 *Id.* 194.) A *bona fide* purchaser of land, no notice of *lis pendens* being filed, is not affected

by the proceedings. (*Bensley v. Mountain Lake Water Company*, 13 *Cal.* 306.)

9. Lien of Decree.—Where a party having notice of the pendency of a suit to reach the equitable interests of a judgment-debtor in his lands, purchases such lands, and enters upon and improves the same, he cannot come into equity for relief, to have his improvements discharged from the lien of the decree rendered against the land. (*Patterson v. Brown*, 32 *N.F.* 81.) It cannot be said that a case is no longer *lis pendens*, after a decree and sale, and a conveyance executed because a court of chancery is not *functus officio* until the decree is executed by delivery of possession. *Jackson v. Warren*, 32 *Ill.* 331.

10. Must be Filed.—It must be filed or appear of record to charge the purchaser of the subject matter of the suit as a purchaser *pendente lite* at common law. Mere pendency of the suit does not so charge the purchaser. (*Head v. Fordyce*, 17 *Cal.* 149; *Ault v. Gassaway*, 18 *Cal.* 205.) If no notice of *lis pendens* is filed, a *bona fide* purchaser of land, without notice of proceedings pending for its condemnation at time of purchase, is not affected by the proceedings. *Bensley v. Mountain Lake Water Company*, 13 *Cal.* 306; *Richardson v. White*, 18 *Cal.* 102.

11. New Notice, when Necessary.—In case of an amendment of the complaint, by adding new parties, or making a change in the description of the premises or in the amount of the claim, a new notice must be filed. (*Clark v. Havens*, *Clarke*, 560; *Curtis v. Hitchcock*, 10 *Paige*, 399.) This is not necessary except as to such new parties, so that when they are subsequently struck out again, no new notice is necessary. (*Waring v. Waring*, 7 *Abb. Pr.* 472.) But even where parties are struck out, the safer practice is to file a new notice. *Curtis v. Hitchcock*, 10 *Paige*, 399.

12. Notice, what to Contain.—Notice should contain the name of the parties to and the object of the action, and a description of the property in that county affected thereby; and the defendant may also, in such notice, state the nature and extent of the relief claimed in the answer. *Cal. Pr. Act*, §§ 27, 207.

13. Partition.—Immediately after filing the complaint in the District Court, the plaintiff shall file with the Recorder of the county or of the several counties in which the property is situated, either a copy

of such complaint, or a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing it shall be deemed notice to all persons. *Cal. Pr. Act*, § 267.

14. Premises Included.—Notice of the pendency of an action should not include premises not seized by the sheriff under an attachment. (*Fitzgerald v. Blake*, 42 *Barb.* 513.) What description of lands in a bill is sufficient to put a purchaser on inquiry, see (*Green v. Slayter*, 4 *Johns. Ch.* 38; compare *Parks v. Jackson*, 11 *Wend.* 442).

15. Purchaser Pendente Lite.—A purchaser *pendente lite* is subject to all the equities of the party under whom he claims. (*McPherson v. Housel*, 2 *Beasley (N.J.)* 299.) Where a notice of *lis pendens* has been filed at the commencement of a suit, a person who purchased the property in litigation during the suit is bound by the decree. (*Hurlbutt v. Butenop*, 27 *Cal.* 50; *Jackson v. Warren*, 32 *Ill.* 331; *Cooley v. Brayton*, 16 *Iowa*, 10.) One who takes an assignment as indemnity against a precedent liability is not a purchaser within the meaning of the Statute requiring notice of the pendency of the suit to be filed. (*Leavitt v. Tylee*, 1 *Sandf. Ch.* 207.) One who purchases land pending an action to foreclose a mortgage on it, or after final judgment, with notice of the pending action, or of the judgment, is bound by the judgment. If no notice of *lis pendens* has been filed, and he purchases without notice, after entry of default, but before final judgment, he is not bound by the judgment, even if a final judgment gives constructive notice to parties dealing with the subject matter, and a second purchaser is in no worse position than his grantor. (*Abadie v. Lobero*, 36 *Cal.* 390.) An action is pending after default, and until final judgment is entered.

16. Purchaser Bound by Decree.—A person purchasing during the litigation, a notice of *lis pendens* being on file, is bound by the decree in such suit. (*Hulbutt v. Butenop*, 27 *Cal.* 50; *Calderwood v. Tevis*, 23 *Id.* 335, *Horn v. Jones*, 28 *Cal.* 194; *Zeiter v. Bowman*, 6 *Barb.* 133; *Griswold v. Miller*, 15 *Id.* 520; *Cleveland v. Boerum*, 23 *Barb.* 201; 27 *Id.* 252; 3 *Abb. Pr.* 294.) But it does not apply to one whose interest subsisted before the suit was commenced, and who might have been made an original party. (*Hopkins v. McLaren*, 4 *Cow.* 667; *Parks v. Jackson*, 11 *Wend.* 442).

17. Subsequent Purchaser.—Every person whose conveyance or incumbrance is subsequently executed, or subsequently recorded, shall be deemed a subsequent purchaser or subsequent incumbrancer, and bound by subsequent proceedings, as if a party to the action. (*People v. Connolly*, 8 *Abb. Pr.* 128.) The record of a chancery suit wherein, a conveyance of land is decreed is not constructive notice, binding upon subsequent purchasers from the party decreed to convey, until after it has been recorded in the county where the land is situated. *Rosser v. Bingham*, 17 *Ind.* 542.

18. When to be Filed.—In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the Recorder of the county in which the property is situated a notice of the pendency of the action. (*Cal. Pr. Act*, § 27.) Filing of notice is not effectual before actual service of summons. (*Burrough v. Reiger*, 12 *How. Pr.* 171; S.C., 3 *Abb. Pr.* 393.) And it has no sooner effect against a grantee from the defendant. (*Farmers' Loan and Trust Co. v. Dickson*, 17 *How. Pr.* 477; S.C., 9 *Abb. Pr.* 61.) But it is effectual where no change in the title takes place, and no new incumbrances attach in the interval between the filing and the service. (*Tate v. Jordan*, 3 *Abb. Pr.* 392; *Burroughs v. Reiger*, 12 *How. Pr.* 171; *Waring v. Waring*, 7 *Abb. Pr.* 472.) The filing of a complaint subsequent to a notice makes the notice valid from that time. (*Benson v. Sayre*, 7 *Abb. Pr.* 472.) A purchaser of real property, pending suit affecting the title to it, is not bound by the judgment, unless notice of *lis pendens* be filed with the County Recorder before the purchase. (*Richardson v. White*, 18 *Cal.* 102.) The Court has no power to take from the files a *lis pendens* regularly filed. *Pratt v. Hoag*, 12 *How. Pr.* 215.

No. 813.

Another Form.

[TITLE.]

Notice is hereby given that an action has been commenced in the District Court of the Judicial District of the State of, in and for the County of, by the above named plaintiff, against the

above named defendant, which suit is now pending. That the object of said suit is to foreclose and determine the lien of a certain mortgage, made the day of, 18.., by A. B. to C. D., and recorded in the office of the County Recorder of the City and County of, State of, on the day of, 18.., in Liber of Mortgages, page; and that the premises thereby conveyed and affected by the suit, are situated in said City and County, and are described as follows, to wit: [*describe property.*]

E. F.,

[DATE.]

Atty. for Plff.

19. Actual Notice.—A party taking an interest in land pending a foreclosure with actual notice of the action, is bound to the same extent as if a *lis pendens* is filed. *Sampson v. Ohleyer*, 22 *Cal.* 200; *Sharp v. Lumley*, 34 *Cal.* 611.

20. Filing and Serving Notice.—It must be filed in every case of foreclosure. *Brandon v. McCann*, 1 *Code R.* 38.

21. Grantee not Charged.—A grantee of land is not charged with constructive notice of the commencement of an action for foreclosure, although a *lis pendens* has been filed, unless the summons has been served on his grantor before conveyance of the land. *Butler v. Tomlinson*, 38 *Barb.* 641.

22. Pendency of Action as Notice.—The pendency of a foreclosure suit charges third persons with notice of the plaintiff's interest in the mortgaged premises. (*Knowles v. Rabbin*, 20 *Iowa*, 101.) After the service of summons, by publication, in a foreclosure suit, no person can acquire rights in the mortgaged premises, to the prejudice of the plaintiff. *Bayer v. Cockerell*, 3 *Kans.* 282.

23. Purchaser Pending Suit.—A purchaser who, pending an action for the foreclosure of a mortgage, and with notice of its pendency, purchases from one of the defendants therein a portion of the mort-

gaged premises, occupies the same position as his grantor, in reference to the issuance of a writ of assistance in favor of the purchaser, under the decree. *Montgomery v. Byers*, 21 *Cal.* 107.

24. Purchaser under Decree.—A decree of foreclosure was obtained against G., and the sale thereunder was made October 1st, 1842; the Sheriff's deed was made and recorded October 27th, 1843. On October 7th, 1843, execution was issued against G., and levied on the land which was sold November 25, 1843, and the Sheriff's deed, executed and recorded March 4, 1844. *Held*, that the title was in the purchaser at the foreclosure sale. (*Bell v. Hall*, 4 *Greene (Iowa)* 68.) See, also, (*Ostrom v. McCann*, 21 *How. Pr.* 431), as to effect of keeping deeds off the record till after sale on foreclosure.

No. 814.

Notice of Pendency of Action of Ejectment.

[TITLE.]

Notice is hereby given, that an action has been commenced in the District Court of the Judicial District of the State of, in and for the City and County of, by the above named plaintiff, against the above named defendant, to recover certain real estate, and the possession thereof, with damages for the withholding thereof; and that the premises affected by this suit are situated in the said City and County, and are bounded and described as follows, to wit: [*describe property.*]

[SIGNATURE]

[DATE]

NOTE.—As elsewhere appears, no notice of *lis pendens* is required in actions of ejectment in California.

*No. 815.**Notice of Pendency of Action to Quiet Title.*

[TITLE.]

Notice is hereby given, that an action has been commenced in the District Court of the Judicial District of the State of, in and for the County of, by the above named plaintiff, against the above named defendant, to quiet the title to the premises and real estate in the complaint in the said action, and hereinafter described, and to determine all and every claim, estate or interest therein of said defendants, or either or any of them, adverse to the said plaintiff, and that the premises affected by this suit are situated in said County, and are bounded and described as follows, to wit: [*describe the premises.*]

A. B.,

[DATE.]

Atty for Plff.

25. Setting Aside Deed.—If a *lis pendens* is filed at the commencement of an action, brought to set aside a deed on the ground of fraud, parties who buy of the defendant pending the litigation are bound by the decree. *Hurlbutt v. Butenop*, 27 *Cal.* 54; *Calderwood v. Tevis*, 23 *Cal.* 335; *Harrington v. Slade*, 22 *Barb.* 162; *Zeiter v. Bowman*, 6 *Id.* 133; *Griswold v. Miller*, 15 *Id.* 520.

CHAPTER V.

CHANGE OF PLACE OF TRIAL.

1. After service of summons and copy of complaint, the attorney for defendant should make inquiry by examining the complaint, as to whether the action is brought in the proper county, and if it is not, the first thing to be done is to move the Court for a change of the place of trial, under Sections 18 and 21 of the California Practice Act. This may be done upon affidavit and notice to the plaintiff. In California, the notice to be given as to time is usually regulated by the rules of court. In Missouri, to entitle a party to a change of venue, he must give the adverse party reasonable notice of his application. (*Byrne v. St. Louis Public Schools*, 12 *Mo.* 402.) And a change of venue should not be granted when applied for in the trial, without any previous notice. *Perry v. Roberts*, 17 *Mo.* 36.

2. The plaintiff in an action may have the place of trial changed upon a proper showing made under the 21st section of the California Practice Act, and upon a proper showing it is error in the Court to refuse. (*Grewell v. Walden*, 23 *Cal.* 168-9.) Our Statute prescribes that it may be done in the following instances: *First*, When the county designated in the complaint is not the proper county. *Second*, When there is reason to believe that an impartial trial cannot be had therein.

Third, When the convenience of witnesses and the ends of justice would be promoted by the change. *Fourth*, When, from any cause, the Judge is disqualified from acting in the action. (*Cal. Pr. Act*, § 21; *Laws of Idaho*, § 21; *Arizona*, § 21; *N.Y. Code*, § 126.) The right to try particular cases in particular counties is a mere privilege, which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place; (*Watts v. White*, 13 *Cal.* 462; see *Pearkes v. Freer*, 9 *Cal.* 642;) as the Court is not bound by its own motion to change the venue.

3. In New York, the motion must be made in the district in which the county named in the complaint is situate, or in the county adjoining such county, being the proper place of trial till changed. *Bangs v. Selden*, 13 *How. Pr.* 163; *Chilbuck v. Morrison*, 6 *Id.* 367; *Beardsley v. Dickerson*, 4 *Id.* 81; *Askins v. Hearn*, 3 *Abb. Pr.* 185.

4. Where the objection appears on the face of the complaint, the motion should be made before or at the time of filing a demurrer, where the grounds are apparent on the face of the complaint, or it will be deemed waived. (*Pearkes v. Freer*, 9 *Cal.* 642; *Jones v. Frost*, 28 *Cal.* 245.) Or before answer. It comes too late after an answer to the merits. (*Tooms v. Randall*, 3 *Cal.* 438; *Reys v. Sanford*, 5 *Id.* 117.) Where the venue is laid in the wrong county, a motion to change may be made before issue joined, or at any time thereafter before trial, or before judgment if no trial is had, even if defendant is in default for not answering. But this is not the practice in California. Here the motion must be

made before the issue. (*Schenck v. McKie*, 4 *How. Pr.* 245; *Hubbard v. National Protection Ins. Co.*, 11 *Id.* 149; see, also, *Toll v. Cromwell*, 12 *Id.* 79; *Conroe v. National Protection Ins. Co.*, 10 *Id.* 403.) But where parties have announced that they are ready for trial, it is too late to ask for a change of venue, unless special circumstances will excuse the delay. (*Fugate v. Carter*, 6 *Mo.* 267.) And a change of venue cannot be awarded after verdict. (*Ex parte Cox*, 10 *Mo.* 742.) A stipulation by plaintiff changing place of trial to a proper county, though not named by defendant in his demand, was held effectual to work a change under this section. *Philbrick v. Boyd*, 16 *Abb. Pr.* 393.

No. 816.

Form of Notice.

[TITLE.]

To, Attorney for Plaintiff.

You will please take notice that the defendant will move this court, at the court room thereof, at the City Hall, in this City, on the day of, 18 . . . , at ten o'clock A.M. of said day, or as soon thereafter as counsel can be heard, for an order changing the place of trial of this action to the District Court of the Judicial District of this State, in and for the County of Said motion will be made upon affidavits, and the papers on file in the case, upon the following grounds:

1. That the property in controversy is situated in said County.

2. That the defendants are both residents of said
..... County.

3. That this is an action against defendant,
for an act done by him in virtue of his office, said de-
fendant being the Sheriff of said County.

A. B.,

[DATE.]

Defendants' Atty.

NOTE.—The applicant may give other statutory reasons according to the facts in each particular case.

5. Joinder of Defendants.—The rule is well settled that all of the defendants must join in the application for a change of venue, or a good reason shown why they do not; otherwise it will be denied. (*Sailly v. Hutton*, 6 *Wend.* 508; *Legg v. Dorshein*, 19 *Wend.* 700; *Welling v. Sweet*, 1 *How. Pr.* 156; *Simmons v. McDougall*, 2 *How. Pr.* 77.) That the motion may be made by one of several defendants, see (*Mairs v. Remson*, 3 *Code R.* 138; *Job v. Butterfield*, 1 *Eng. Law and Eq.* 417.) On notice to the other defendants, unless they be in default. Or a defendant subsequently served may move for a change of place of trial. (*N. J. Zinc Co. v. Blood*, 8 *Abb. Pr.* 148.) This however seems questionable, and cannot be done where part of the defendants live in the county where the action is brought, if the motion is made on the ground that the action is not brought where defendants reside or where the contract was made.

No. 817.

Statement of Ground—Not the Proper County from Situation of Subject Matter.

[*Substitute in preceding form:*]

That this is an action for the recovery of real property, or of an estate, or interest therein, or for the determination in some form of such right or interest, or

for injuries to real property, and that the said real property is wholly situate in the said last named County. (*Cal. Pr. Act*, § 18, Subd. 1.)

[*Or*, That this is an action for the partition of real property, which said property is wholly situate in the said County to which the desired change is asked.] (*Cal. Pr. Act*, § 18, Subd. 2.)

[*Or*, That this is an action for the foreclosure of a mortgage of real property, and that the land in said mortgage described is wholly situate in said last named County.] (*Cal. Pr. Act*, § 18, Subd. 3.)

6. Mining Claims.—Mining claims are real estate within the meaning of this Act, and are governed by the provisions of this section. Where a suit for real estate is broeght in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And in such case there is no discretion in the Court, the change being a matter of right. *Watts v. White*, 13 *Cal.* 321.

No. 818.

Statement of Ground—*Not the County where the Cause of Action Arose.*

[*Substitute in Form*, No. 816:]

That this is an action for the recovery of a penalty or forfeiture imposed by statute, except, etc. (see *Cal. Pr. Act*, § 19, Subd. 1); and that it arose in the said last named County.

Or, That this is an action against defendant for an act done by him in virtue of his office, said defendant being the of said last named County, and a resident thereof (*Cal. Pr. Act*, § 19, Subd. 2); [*or* (when the act complained of was done by, and suit was brought against a person who, by command of such

officer, or in his aid, performed the act which is the subject of the action, add] and that such person is a resident of said last named county, etc.

NOTE.—It is not expected that each form given will exactly fit each case, as it arises in the practice—but the general form is deemed correct.

No. 819.

Affidavit on the Ground of Non-Residence.

[TITLE.]

[VENUE.]

A. B., the defendant in the above entitled action, being duly sworn, deposes and says as follows:

All the parties to this action reside in the County of, in this State.

[SIGNATURE.]

[*Jurat.*]

7. Residence of Parties.—By the “proper county” is meant a county in which one of the parties to the action resides. (*Lynch v. Mosher*, 4 *How Pr.* 88 ; 2 *Code R.* 54.) Where plaintiff is a foreign corporation, the proper county is the county where the defendant resides. (*Internat. Ins. Co. v. Sweetland*, 14 *Abb. Pr.* 240.) The principal place of business of a corporation is its residence, within the meaning of that term. (*Jenkins v. Cal. Stage Co.*, 22 *Cal.* 537.) A willful or careless ignorance of the residence of the defendant does not put it in the power of the plaintiff to sue him in any county of the State, however remote from his residence. * * * To resist the application of the defendant, the plaintiff should have shown that he used all proper diligence to ascertain the residence of the defendant before suit, and failed. *Loehr v. Latham*, 15 *Cal.* 418.

*No. 820.**Affidavit, on Ground of Partiality and Prejudice.*

[TITLE.]

[VENUE.]

C. D., the defendant in the above entitled action, being duly sworn, depose and says as follows:

I have reason to believe and do believe that I cannot have a fair and impartial trial in said Court in which this action is brought, by reason of the interest, prejudice, and bias of the people of said County [*give the facts*].

A. B.

[*Jurat.*]

8. Circumstances.—In New York, it is necessary to state in the affidavit facts and circumstances which induce the belief that an impartial trial cannot be had, in order that the Court may judge whether the belief is well founded; the affidavits of individuals to their belief that an impartial trial cannot be had is insufficient. (*Bowman v. Ely*, 2 *Wend.* 250; *People v. Bodine*, 7 *Hill*, 147; *People v. Vermilye*, 7 *Cov.* 108, 137; *Scott v. Gibbs*, 2 *Johns. Cas.* 116.) As to what is sufficient evidence that an impartial trial cannot be had, see *People v. Webb*, 1 *Hill*, 179; *People v. Long Island R.R. Co.*, 4 *Park Cr.* 602; *Budge v. Northam*, 20 *How. Pr.* 248; *People v. Long Island R.R. Co.*, 16 *Id.* 106.

9. Corporation.—The venue in a trial where a corporation is plaintiff will not be changed on the bare allegation that an impartial trial could not be had. (*Corporation of N.Y. v. Dawson*, 2 *Johns. Cas.* 335.) When by actual experiment it is found that a fair trial or even a verdict cannot be had in the County, the venue may be changed on the ground of public excitement. (*Messenger v. Holmes*, 12 *Wend.* 203.) But actual experiment is not the only test. *People v. Webb*, 1 *Hill*, 179.

10. Evidence of Facts.—It has been said that an actual experiment should be first made by attempting to impanel a jury, or by at least one trial of the cause. (*Messenger v. Holmes*, 12 *Wend.* 203; *People v. Wright*, 5 *How. Pr.* 23.) But this rule has not been sustained, and other circumstances than an actual trial are sometimes held sufficient evidence that an impartial trial cannot be had. *People v. Webb*, 1 *Hill*, 179; *People v. Long Island R.R. Co.*, 4 *Park. Cr.* 602; *Budge v. Northam*, 20 *How. Pr.* 248.

11. Facts and Circumstances.—The affidavit must not only set forth a belief that a fair and impartial trial cannot be had, but also the facts and circumstances on which that belief is founded; and the difficulty should be clearly established. 3 *Burr.* 1,330; 1 *Bl. R.* 378; 1 *Chitt. Cr. L.* 200; *Rosc. Cr. Ev.* 236; 7 *Cow.* 137; 1 *Hill*, 179; *People v. Bodine*, 7 *Hill*, 147; *People v. Wright*, 5 *How. Pr.* 23; S.C., 3 *C. R.* 75; to similar effect; *Scott v. Gibbs*, 2 *Johns. Cas.* 116; S.C., *Col. & C. Cas.* 128.

12. Facts, how Stated.—The affidavit on motion for change of venue should state the facts in such a manner as to enable the Court to draw its own inference whether or not an impartial trial could be had in the particular case. If it fail in this, it will not warrant the Court in changing the venue. (*Sloan v. Smith*, 3 *Cal.* 410; *State v. Millain*, 3 *Nev.* 409; *Ward v. Mooney*, *Sup. Ct. Wash. T.* 122; *Bowman v. Ely*, 2 *Wend.* 250; *People v. Bodine*, 7 *Hill*, 147; *People v. Vermilye*, 7 *Cow.* 108, 137; *Scott v. Gibbs*, 2 *Johns. Cas.* 116.) The facts must appear very conclusively. (2 *Johns. Cas.* 335.) Or, in action of slander or libel, that violent party spirit prevailed. (1 *Caine's Rep.* 487; 2 *Wend.* 250; 3 *Caine's R.* 127; 12 *Wend.* 203.) Affidavits which do not show that a fair and impartial trial cannot be had in the county in which the action is brought, are not sufficient. *Hale & Norcross G. and S. Mi. Co. v. Bajazette and Golden Era G. and S. Mi. Co.* 1 *Nev.* 322.

13. General Sentiments.—The general sentiments of the community respecting the merits of an exciting case may be such an obstacle to the administration of justice that a change should be ordered. (*People v. Baker*, 3 *Park. Cr.* 187; S.C., 3 *Abb. Pr.* 342.) But the Court will not grant a change of venue on the ground that the prejudices of the people of the county are against turnpike roads, in an action where such a company is a party. *New Windsor Turnpike Co. v. Wilson*, 3 *Cai.* 127; S.C., *Col. & C. Cas.* 467.

14. Granting Discretionary.—The granting or refusing of a change of venue, by reason of the bias and prejudice of the citizens of the County, is discretionary with the Court, subject to revision only in cases of abuse. *Watson v. Whitney*, 23 *Cal.* 375.

15. Public Excitement.—In a clear case, the place of trial of a cause may be changed on the ground of public excitement, although there has been no actual effort made to try the cause or to impanel a jury in the county where the venue is laid. 1 *Hill*, 179; *People v. Long Island R.R. Co.*, 4 *Park. Cr.* 602; 16 *How. Pr.* 106; *Budge v. Northam*, 20 *Id.* 248.

16. Public Influence.—In an action against a sheriff, the influence of his office in his county is not a reason for changing the venue. *Baker v. Sleight*, 2 *Cai.* 46; *Col. & C. Cas.* 343.

17. Strong Prejudice.—The allegations in the affidavits of the defendants, that a strong prejudice exists in San Francisco, among persons likely to be called as jurors, against driving cattle through the streets of the City, and against persons engaged in that business, are not sufficient to show that he cannot have a fair and impartial trial in San Francisco. They furnish no affidavits of persons acquainted with the facts, nor do they state that they have made any inquiries of the citizens on which to base such an opinion. (*Fickens v. Jones*, *Cal. Sup. Ct.*, *Oct. T.*, 1863, not reported.) Where one hundred citizens united in employing counsel to prosecute the defendant: *Held* to be a sufficient ground for a change of venue. *People v. Lee*, 5 *Cal.* 353.

18. Violent Party Spirit.—The Court will not retain the venue on the ground that a violent party spirit prevails in the County to which it is moved to be changed. So *held* in an action for slander in reference to official acts. *Zabrieskie v. Bauder*, 1 *Cai.* 407.

No. 821.

Affidavit—On Account of Convenience of Witnesses.

[TITLE.]

[VENUE.]

C. D., the defendant above named, being duly sworn, deposes and says as follows:

I. The summons and complaint in this action were served on me on the day of, 18...

II. I further say, that I have fully and fairly stated the facts of the case to G. H., my counsel, who resides at No., in Street, in the City of, and after such statement I am by him advised that I have a good and substantial defense on the merits to the action, as I am advised by my said counsel, and verily believe to be true.

III. I have fully and fairly stated to my counsel the facts which I expect to prove by each and every one of the following witnesses, viz.: J. K., L. M., and O. P.; and each and every one of them are material and necessary witnesses for my defense on the trial of this cause, as I am advised by my said counsel, and verily believe, and that without the testimony of each and every one of the said witnesses, I cannot safely proceed to the trial of this cause, as I am also advised by my said counsel, and verily believe.

IV. That each and every one of said witnesses resides in the County of, viz.: [*state the residence of each.*]

V. The facts which I expect to prove by said witnesses are as follows: By J. K., the fact that, *etc.*; by L. M., that, *etc.*

[SIGNATURE.]

[*Jurat.*]

19. Affidavit of Merits.—An affidavit of merits, which declares “that the defendant has fully and fairly stated the case to his counsel, and that he has a good and substantial defense on the merits of the whole of the plaintiff’s demand, as he is advised by his said counsel, and verily believes to be true,” is sufficient. (*Beetler v. Mitchell*, 17 *Wis.* 52.) The affidavit of merits must be made and served with notice of motion. (*Lynch v. Mosher*, 4 *How. Pr.* 86; 2 *Code Rep.* 54.) As to sufficiency of affidavit of merits, consult *Richards v. Sweetzer*, 1 *Code Rep.* 117; *Ellis v. Jones*, 6 *How. Pr.* 296; 3 *How. Pr.* 413; *Jordan v. Garrison*, 6 *How. Pr.* 6; *Mixer v. Khun*, 4 *How. Pr.* 412.

20. By Whom Made.—The affidavit shall be made by the defendant himself, but may be made by defendant’s attorney where special reasons are shown. *Scott v. Gibbs*, 2 *Johns. Ch.* 116.

21. Facts to be Proved.—The facts expected to be proved must be stated in the affidavit, and wherein they are material must be shown. (*People v. Hayes*, 7 *How. Pr.* 248.) And the facts that each is expected to prove should be specifically stated where there is any contest as to the convenience of witnesses. *Price v. Fort Edward Water Works*, 16 *How. Pr.* 51.

22. Granting Motion Discretionary.—The granting or refusing of a motion to change the venue on the ground of convenience of witnesses is discretionary with the trial court, and subject to review only in cases of abuse. *Pierson v. McCahill*, 22 *Cal.* 127.

23. What Affidavit should State.—The motion is founded on affidavit, which, if grounded on the convenience of witnesses, should state their names (*Onondaga Co. v. Sheppard*, 19 *Wend.* 10; 6 *Cow.* 389), and residence. (3 *Hill*, 445; 1 *How. Pr.* 195.) The statement that they are residents of the county merely is not sufficient; (*Anonymous*, 6 *Cow.* 389; *Westbrook v. Merritt*, 1 *How. Pr.* 195; see *Pierce v. Gunn*, 3 *Hill*, 445;) as the place of trial will be determined by the county in which the witnesses reside rather than by

the distance they must travel. (*Hull v. Hull*, 1 *Hill*, 671; *People v. Wright*, 5 *How. Pr.* 23.) That each and every one is a necessary witness must appear, and that without the testimony of each he could not safely proceed is also essential. (*Onondaga Co. Bk. v. Shepherd*, 19 *Wend.* 10; *Satterlee v. Groot*, 6 *Cow.* 33; *Anonymous*, 3 *Id.* 425; *Anonymous*, 6 *Cow.* 389; *Constantine v. Dunham*, 9 *Wend.* 431.) The words *every one of them* are held essential. (*Id.*) It must appear that the witnesses are necessary as well as material. (*Satterlee v. Groot*, 6 *Cow.* 33; see *Young v. Scott*, 3 *Hill*, 32, 35.) And wherein they are material. (*People v. Hayes*, 7 *How. Pr.* 238.) And that without them he cannot safely go to trial. (3 *Wend.* 425; 9 *Id.* 431.) Very little reliance is placed by the courts upon a general allegation of the materiality of witnesses, unless it be shown *wherein they are material*. *People v. Hayes*, 7 *How. Pr.* 248.

24. What Affidavit should State.—The affidavit, in New York, should state among other things that he fully and fairly stated his case to counsel (3 *Wend.* 425; 9 *Id.* 431; 3 *Cow.* 14), giving name and residence of such counsel (4 *How. Pr.* 86; 3 *Id.* 412; 6 *Id.* 296; 1 *Code Rep.* 117), and has fully and fairly disclosed to him the facts which he expects to prove by each (9 *Wend.* 10; 1 *How. Pr.* 55, 70, 165; 1 *Hill*, 668; *Am. Ex. Bk. v. Hill*, 22 *How. Pr.* 29); and that he has a good and substantial defense upon the merits. (1 *How. Pr.* 162.) When defendant is himself a counselor, the affidavit may be modified accordingly. (*Cromwell v. Van Rensselaer*, 3 *Cow.* 346.) It should also state the name of the county designated in the complaint as the county of trial. (1 *How. Pr.* 184; 1 *Hill*, 668.) And if not made by all the defendants, the reason why. 7 *How. Pr.* 156.

25. When Motion may be Made.—It would seem that in Nevada an application for change of venue for convenience of witnesses is proper after answer filed and cause set for trial. (*Sheckles v. Sheckles*, 3 *Nev.* 404.) The following New York authorities appear to sustain the proposition that a motion to change the place of trial on the ground of convenience of witnesses (*Mason v. Brown*, 6 *How. Pr.* 481) cannot be made before issue joined. (*Mixer v. Kuhn*, 4 *How. Pr.* 409; *S.C.*, 3 *C.R.* 106; *Barnard v. Wheeler*, 3 *How. Pr.* 71; *Clark v. Pettibone*, 2 *Code R.* 78; *Hartman v. Spencer*, 5 *How. Pr.* 135; to similar effect, *Jefferson Co. Bank v. Prime*, 3 *Id.* 278; to the contrary, *Schenck v. McKie*, 4 *Id.* 246; compare *Myers v. Fester*, *Id.*

240; *Lynch v. Mosher*, *Id.* 86.) Or where the answer denied most of the material allegations of the complaint, and the time to answer was past (*Beardsley v. Dickerson*, 4 *How. Pr.* 81), that it should not be made before issue. *Merrill v. Grinnell*, 10 *Id.* 31; *Toll v. Cromwell*, 12 *Id.* 79; *Hinchman v. Butler*, 7 *Id.* 462; *Hubbard v. Nat. Ins. Co.*, 11 *How. Pr.* 149; *Hinchman v. Butler*, 7 *Id.* 462.

No. 822.

Affidavit on the Ground of Disqualification of the Judge.

[TITLE.]

[VENUE.]

C. D., the defendant above named, being duly sworn, deposes and says as follows:

I am informed and verily believe that the Honorable X. Y., Judge of the Court in which the complaint in this action is filed, is disqualified from presiding in the same, [he being related to the plaintiff within three degrees of consanguinity, to wit: a brother of the plaintiff; *or* he having heretofore acted as counsel in this action on the part of the plaintiff.]

[SIGNATURE.]

[DATE.]

NOTE.—This affidavit is rarely if ever made, as a rule; the bare suggestion to the Judge of any one of these facts is sufficient.

26. Bias or Prejudice.—Bias or prejudice on part of the judge constitutes no legal incapacity to sit on trial of a cause, nor is it a sufficient ground to authorize a change of place of trial. (*People v. Williams*, 24 *Cal.* 31.) The fact alone, that the judge, on a previous trial of the same cause, made an erroneous ruling, is no evidence of the existence of bias or prejudice in his mind. *Id.*

27. Consanguinity.—A judge who is related to either of the

parties to an action within the third degree of consanguinity, is incompetent to try an action between them. (*De la Guerra v. Burton*, 23 *Cal.* 592.) If a judge is related to either of the parties to an action, by consanguinity or affinity within the third degree, he is disqualified from acting in the case in any matter except in the arrangement of the calendar or regulation of the order of business. Even if no objection is made, he has no right to act, and ought of his own motion to decline to sit as judge. In such case, an order of the judge dismissing the action is void, on the ground of his incapacity to act. (*People v. José Ramon de la Guerra*, 24 *Cal.* 73.)

28. Counsel in the Case.—It was held sufficient cause that the judge where the venue was laid was previous to his appointment counsel in the cause. (2 *Wend.* 290.) Where the Probate Judge held a power of attorney from certain persons claiming to be the heirs at law of the deceased, and authorizing him to receive for them all money and property which they might be entitled to from the estate, for which he was to receive a per centage upon the proceeds of the estate, and that these proceedings were instituted at the instance of said Probate Judge, a change of venue should be granted under the Statutes 1863, p. 343, § 66. *Estate of White*, *Cal. Sup. Ct., Apl. T.*, 1869; citing *Oakley v. Aspinwall*, 3 *N.F.* 547.

29. Information and Belief.—An affidavit made on application to change the place of trial, which states "that the Judge, as the affiant is informed, and verily believes, has frequently stated that he believes the affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to the affiant in connection with said charge," does not merit consideration, as it contains a mere charge upon information and belief, and does not show how the information was obtained, or upon what the belief was based. (*People v. Williams*, 24 *Cal.* 31.) And we might add that such an affidavit, unless some facts are stated, ought to subject the party making it to punishment for contempt.

30. Partisan Feeling.—The exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgment of the Court, and bring the administration of justice into contempt, are not, under our Statute, sufficient to authorize a charge of venue, on the

ground that the judge is disqualified from sitting. The law establishes a different rule for determining the disqualification of judges from that applied to jurors. *McCauley v. Weller*, 12 *Cal.* 500.

31. Transfer of Cause.—Where a judge is incapacitated to act as such, the action should be transferred—not dismissed; an order dismissing the action would be null and void. *Burton v. Covarrubias*, *April T.*, 1865, not reported.

No. 823.

Form of Motion under the New York Practice, on Notice without Stay.

[TITLE.]

Please take notice, that on an affidavit of which a copy is herewith served on you, and upon the complaint in this action, and the demand to change the place of trial heretofore served on you, the undersigned will move the Court, at a special term to be held at, on the day of, 18.., at o'clock, that the place of trial in this action be changed from the County of to the proper county, viz., the County of [*designating it*].

[SIGNATURE.]

[Address.]

*No. 824.**Demand for Change.*

[TITLE.]

I hereby demand that the place of trial of this cause be changed to the proper county, viz., the County of

[SIGNATURE.]

[DATE.]

[Address.]

32. Demand.—In New York, to procure a change of the place of trial, a demand is first necessary, the service of which is an essential prerequisite to the motion. (*N.Y. Code*, § 126; *Vermont Cent. R.R. Co. v. Northern R.R. Co.*, 6 *How. Pr.* 106.) And if the plaintiff fails to consent to the demand, application must be made to the Court. *Id.*; *Hasbrouck v. McAdam*, 4 *How. Pr.* 342; *March v. Lowry*, 16 *How. Pr.* 41; 26 *Barb.* 197; *Houck v. Lasher*, 17 *How. Pr.* 520.

33. Statement in Demand.—In the demand, the name of the proper county to which a removal is sought must be inserted. (*Beardsley v. Dickerson*, 4 *How. Pr.* 81.) And service must be made on the opposite counsel before the time for answering expires. (*Milligan v. Brophy*, 2 *Code R.* 118.) But it may be made simultaneously with the service of the answer. (*Main v. Remsen*, 3 *Id.* 138.) But not after, although defendant answered before his time had expired. (*Milligan v. Brophy*, 2 *Code R.* 118.) But on a motion to change place of trial, under Subdivisions 2 and 3 of Section 126, a previous demand in writing is not necessary. Either party may move when an impartial trial could not be had, or when convenience of witnesses would be promoted. (*Hinchman v. Butler*, 7 *How. Pr.* 462.) A demand specifying an improper county is irregular. (*Beardsley v. Dickerson*, 4 *How. Pr.* 81.) On a demand, there must be an order or consent; mere service of demand is not sufficient. (*Hashbrouck v. McAdam*, 4 *How. Pr.* 332; 3 *Code R.* 39.) In a demand to change the place of trial to the proper county, any suggestion as to which is the proper county is surplusage. *Philbrick v. Boyd*, 16 *Abb. Pr.* 393.

*No. 825.**Order to Show Cause Thereon.*

[TITLE.]

On the following affidavit,

ORDERED, that the plaintiff show cause, at the term of the Court, to be held at, *etc.*, on, *etc.*, why the Court should not change the place of trial to the County of and let all the plaintiff's proceedings herein be stayed until the further order of the Court.

NOTE.—This is not the practice in California.

*No. 826.**Order to Show Cause, with Stay of Proceedings, under the New York Practice.*

[TITLE.]

On the foregoing affidavit, and on the pleadings therein mentioned, let the plaintiff show cause, at, on the day of, at o'clock in the noon, or as soon thereafter as counsel can be heard, why the place of trial of this action should not be changed from the County of to the County of, and why the defendant should not have the costs of this motion, and such other relief as may be just. And until the determination of this motion, let all proceedings on the part of the plaintiff be stayed.

*No. 827.**[Order Revoking Stay of Proceedings.]*

[TITLE.]

[Commencement as in Form No. 22, Vol. I., p. 182.]

The plaintiff in the above cause having presented and filed with me an affidavit showing such facts as will entitle him to retain the venue in this cause, I hereby revoke the order to stay proceedings granted by me on the date of the order.

*No. 828.**Affidavit Resisting Motion for Change.*

[TITLE.]

[VENUE.]

A. B., plaintiff above named, being duly sworn, says as follows :

I. I have fully and fairly stated to E. F., my counsel in this cause, who resides at, in the County of, the facts which I expect to prove by each and every one of the following witnesses, viz., G. H., of the town of, J. K., of the town of, L. W., of the town of; all of whom reside in said County of; and that they are, each and every one of them, material and necessary witnesses for me on the trial of this cause, as I am advised by said counsel, and as I verily believe; and that without the testimony of each and every one of said witnesses I cannot safely proceed to the trial of this cause, as I am also advised by my said counsel, and verily believe.

II. That the facts which I expect to prove by said witnesses are as follows: [*state in detail the facts and circumstances expected to be proved by each witness, naming him, and the materiality of those facts.*]

[SIGNATURE.]

[*Jurat.*]

34. Convenience of Witnesses.—Where a change of venue is asked by defendant on the ground of his residence, if the convenience of witnesses requires that the action should be retained for trial in the court where it was commenced, the plaintiff should present that fact in opposition to the motion, and if he neglects to do so, it is doubtful whether he can afterwards apply to the court to which it has thus been removed, to have it sent back again. (*Pierson v. McCahill*, 22 Cal. 127.) The affidavits show that the acts complained of were committed in the city of San Francisco, and *prima facie* the convenience of witnesses would require that the action should be tried in that County. The affidavits of both parties show that a greater number of the witnesses to the act committed, and the injury caused thereby, reside in San Francisco; and even those who reside in Sonoma County can travel to San Francisco nearly as conveniently as to the county seat of the former County. *Fickens v. Jones*, *October T.*, 1863, not reported.

35. Form.—The plaintiff's affidavit should be in form and substance similar to that required of the defendant. (*Onondaga Co. Bk. v. Shepherd*, 19 *Wend.* 10; *American Exchange Bk. v. Hill*, 22 *How. Pr.* 29.) Affidavits to oppose a motion for a change of place of trial, on the ground of convenience of witnesses, as well as the moving affidavits, should state what is expected to be proved by the witnesses. *American Exchange Bk. v. Hill*, 22 *How. Pr.* 29.

36. Jurisdiction.—The voluntary appearance of a party resisting a change of venue gives the Court jurisdiction over his person, and waives all prior informalities. *Powers v. Browder*, 13 *Mo.* 154.

37. Not the Proper County.—A motion to change the place of trial, on the ground that the county named is not the proper county,

cannot be resisted on the ground of convenience of witnesses. (7 *How. Pr.* 356; *Interna. Life Assurance Co. v. Sweetland*, 14 *Abb. Pr.* 240.) As a matter of practice, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist by a counter motion to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter motion, may simply resist the motion of defendant, but reasonable time should be allowed defendant if desired, to meet the matter set up in opposition to the original motion. (*Loehr v. Latham*, 15 *Cal.* 418; see *Jenkins v. California Stage Co.*, 22 *Cal.* 537.) On motion by defendant to change the place of trial, on ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses, the evidence as to the convenience should be as full and particular as that which is required upon application for this cause to transfer the trial to another county. The affidavit must state the names of the witnesses. (*Loehr v. Latham*, 15 *Cal.* 418.) As to opposition of plaintiff, on ground of convenience of witnesses, consult (*Moore v. Gardner*, 3 *Code Rep.* 224;) subsequent to which decision the law had been changed. (See *Mason v. Brown*, 6 *How. Pr.* 483.) In certain cases the doctrine of (*Mason v. Brown*) will not obtain. See *Parker v. Carnley*, 7 *How. Pr.* 356.

38. Plaintiff may Oppose.—The plaintiff may oppose the motion by affidavit showing material witnesses (1 *How. Pr.* 56) residing in the county named as the county of trial; (2 *Caine's Rep.* 374; 3 *Id.* 95; 2 *Johns.* 481; 7 *Cow.* 102; 19 *Wend.* 10;) and unqualifiedly that he has witnesses in or near the county named, of an equal or greater number than those named in defendant's affidavit. (12 *Wend.* 294; 1 *Hill*, 668, 671; 5 *Cow.* 414; *Austin v. Hinkley*, 13 *How. Pr.* 576.) The motion for change of place of trial for convenience of witnesses will not in all cases be denied, where plaintiff's witnesses outnumber those of defendant. 5 *Hill*, 509; 1 *How. Pr.* 73.

39. Re-Change of Venue.—In New York, after the venue is changed to proper county, the plaintiff can move to change it back to the county originally named in the complaint, if the convenience of witnesses requires. But on the defendant's motion, the convenience of witnesses cannot be taken into account. The defendant has no opportunity to be heard on that question, or at least none to present any affidavit in relation to it. (*Moore v. Gardner*, 5 *How. Pr.*

243; *Park v. Carnley*, 7 *Id.* 355; *Hubbard v. National Protection Ins. Co.*, 11 *Id.* 149; *International Life Assurance Co. v. Sweetland*, 14 *Abb. Pr.* 240.) But where the motion is delayed till after issue joined, the convenience of witnesses may be regarded. *Mason v. Brown*, 6 *How. Pr.* 481.

40. Time.—Time to file counter-affidavits, on a motion to change the place of trial, is a matter of discretion in the lower court, and will not be reviewed on appeal. *Pierson v. McCahill*, 22 *Cal.* 127.

No. 829.

Order Denying Motion.

[TITLE.]

[*Commencement as in Form No. 22, Vol. I., p. 182.*]

It is hereby ordered that the motion to change the place of trial in this action be denied, with dollars costs.

41. Costs.—Where the motion is denied because the papers are defective, the costs of the motion are made absolute. (*Sill v. Trumbull*, 1 *Cow.* 589.) So, where it was manifest that the motion was made for the purposes of delay. (*Kilbourne v. Fairchild*, 12 *Wend.* 293; and see *Anonymous*, 18 *Id.* 514.) Where the motion is made after the cause is noticed for trial, if the motion is denied, the defendant will be obliged to pay the costs of the plaintiff in preparing for trial up to the time of the order staying proceedings. (*Budd v. Malburn*, 1 *Cow.* 47.) If granted, it will be on condition of the payment of such costs. *Carpenter v. Watrous*, 5 *Wend.* 102.

42. Dismissal—Effect of.—When two motions are pending in an action at the same time, one to change the venue, and one to dismiss, an entry of a judgment of dismissal, without any formal order denying the motion to change the venue, is a virtual denial of the same. *People v. José Ramon de la Guerra*, 24 *Cal.* 73.

43. Motion—Too Late.—Where a motion was made to change

the venue on the ground that neither of the parties resided in the district, where no objection was made in the answer, and after nearly six months had elapsed before the objection was taken: *Held*, that the motion came too late, and was properly rejected. *Tooms v. Randall*, 3 *Cal.* 438.

44. Order—Appeal from.—An appeal from an order refusing to change the venue of an action, operates as a stay of all further proceedings in the case in the court below until such an appeal is determined. (*Pierson v. McCahill*, 23 *Cal.* 249.) The statutes have been changed and no appeal lies in such a case. An order refusing a change of venue on the application of defendant in a criminal prosecution will only be received in cases of gross abuse of discretion. (*People v. Fisher*, 6 *Cal.* 154.) But it is not to be supposed that the Supreme Court will trust implicitly in the discretion of inferior courts. *People v. Lee*, 5 *Cal.* 353.

45. When Motion will be Denied.—Motion will be denied when it is clear defendant's object is merely delay. (12 *Wend.* 293; 22 *Id.* 615; 10 *Id.* 571.) Or where his affidavit is defective. (19 *Wend.* 617; 9 *Id.* 431; 22 *Id.* 636; 2 *Hill*, 359.) Or where by stipulation evidence is confined to facts occurring in the county where venue is laid. (*Smith v. Averill*, 1 *Barb.* 28.) Or where plaintiff undertook to bear all expenses of bringing defendant's witnesses. (*Worthy v. Gilbert*, 4 *Johns.* 492; but see *Rathbone v. Harmon*, 4 *Wend.* 208.) Or where after service of papers for a motion to change venue, plaintiff amended his complaint changing the venue; (1 *Hill*, 374;) or agreed to change the venue. (2 *Wend.* 498.) Or where defendant suffered a default. (4 *Hill*, 69.) A change of venue is properly refused, unless a party has complied with the requisition of the Statute. (*Lewin v. Dille*, 17 *Mo.* 64.) Probable delay of trial in the county which would otherwise be most convenient is a reason for refusing the change. *King v. Vanderbilt*, 7 *How. Pr.* 385; *Goodrich v. Vanderbilt*, *Id.* 467.

*No. 830.**Order Granting Change of Place of Trial.*

[TITLE.]

[*Commencement as in Form 22, Vol. I., p. 182.*]

It is hereby ordered that the place of trial of this action be and hereby is changed from the County of to the County of

46. Defective Affidavit.—The fact that the affidavit for a change of venue may be defective will not render the order changing the venue a nullity, nor should the case be dismissed for this defect. The objection should be made at the time the petition for a change is presented. *Potter v. Adams*, 24 *Mo.* 159.

47. Judicial Action.—Although the affidavit upon which the application to change the venue of an action is made may not show any legal cause for such change, still if the Court grants the application, it has acted judicially upon a matter within its cognizance, and where it was clothed with discretion, and by the order the place of trial becomes changed (*The People v. Sexton*, 24 *Cal.* 78), it is error in the Court to refuse to change the place of trial upon a proper showing. *Grewell v. Walden*, 23 *Cal.* 165.

48. Proceedings and Practice.—If the defendant procures a change of venue, the plaintiff may pay the costs and transmit the papers to the county fixed as the place of trial, and have the case placed on the calendar and tried. (*Brooks v. Douglass*, 32 *Cal.* 208.) On a motion to change the place of trial, the costs were usually made to abide the event of the suit, whether the motion be granted or denied. (*Gidney v. Spelman*, 6 *Wend.* 525; *Norton v. Rich*, 20 *Johns.* 475; but see *Worthy v. Gilbert*, 4 *Id.* 492.) But it may be otherwise where plaintiff has not complied with a demand. (*Hubbard v. National Protection Ins. Co.*, 11 *How. Pr.* 149.) As to costs in special cases, see *Purdy v. Wardell*, 10 *Wend.* 619; *Donaldson v. Jackson*, 9 *Id.* 450.

49. Service of Order.—In New York, a certified copy of this order must be served upon the plaintiff; otherwise the plaintiff may

proceed as if the place of trial had not been changed. (*Root v. Tyler*, 18 *Johns.* 335; *Keep v. Tyler*, 4 *Cow.* 541.) An appearance and trial is a waiver of any irregularity in the change of venue. (*Bettis v. Logan*, 2 *Mo.* 2.) A change of place of trial leaves all the other proceedings unchanged. *Gould v. Chapin*, 4 *How. Pr.* 185; 2 *C.R.* 107.

CHAPTER VI.

TRANSFER OF CAUSES.

50. Causes may be removed from one district or county to another county or district, in the manner provided by the Statute. (*Reyes v. Sanford*, 5 *Cal.* 117.) *First*, Causes in a district court may be transferred to another district court. *Second*, Causes in a county court to a district court, or another county court. *Third*, Causes in a probate court to a district court, or other probate court. *Fourth*, Causes in a justice's court to another justice's court in the same county. (*Laws of Cal.* ¶ 5,600.) The plaintiff commenced an action of forcible entry and detainer against the defendant, in a justice's court. The Justice, instead of trying the case, certified it to the District Court. *Held*, that the transfer was illegal, and could not defeat the plaintiff's rights by operating a discontinuance. *Larue v. Gaskins*, 5 *Cal.* 507.

No. 831.

Order to Transfer Cause to Another Court, on Account of Disability of the Judge.

[TITLE.]

It being shown to the Court by G. H., of counsel for the defendant, that the Judge of this Court was heretofore of counsel in a cause involving the same title which is in issue in this cause:

Wherefore it is ordered, that this cause be transferred to the District Court of the Judicial District for trial.

No. 832.

Notice of Time and Place of Trial of Transferred Action.

[TITLE.]

To A. B., the plaintiff in the above-entitled action, and C. D., the defendant in said action:

You will please take notice that the said action, transferred to the above entitled court from the Court of the Township, in the County of, is set for trial before me, at my court-room in said Township, in said County, the day of, 18.., at o'clock, P.M.

[DATE.]

J. P.,
Justice of the Peace of
said Township.

REMOVAL TO UNITED STATES COURTS.

51. Under the Act of Congress of 1789, and the Statute of this State of 1855, respecting the transfer of

actions from a State to a United States court, the Court to whom the application is made must, before granting it, be satisfied that the application is founded upon facts which entitle the applicant to the order, and for this purpose has the right to inquire into the truth of the facts set forth in the petition, as well as to investigate the sufficiency of the security. (*Orosco v. Gagliardo*, 22 Cal. 83.) In general, a removal to a federal court in a case within the provisions of the Acts of Congress, is a matter of right. (*Gordon v. Longest*, 16 Pet. 97.) But the petition cannot be filed *nunc pro tunc*, where the Court see that it was not filed till a subsequent term. *Gibson v. Johnson*, Pet. C. Ct. 44; *Ward v. Arredondo*, 1 Paine, 410.

52. The amount involved must be five hundred dollars, to authorize a removal. (*Gen. Laws of Cal.* ¶ 5,606; *Ladd v. Tudor*, 3 Woodb. & M. 325.) But an amendment reducing the amount will not affect his right. (*Kanouse v. Martin*, 15 How. U.S. 198; and see *Wright v. Wells*, 1 Pet. C. Ct. 220.) The sum demanded in the complaint may be referred to as presumptively the amount in controversy. (*Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 15 How. U.S. 198; *Munns v. Dupont*, 2 Wash. C. Ct. 453.) As to whether the plaintiff may defeat the petition by amending so as to reduce the amount, or by releasing a part of the claim, see *Kanouse v. Martin*, 15 How. U.S. 198; *People v. New York C. P.*, 2 Den. 197; *Disbrow v. Driggs*, 8 Abb. Pr. 305, n.; *Wright v. Wells*, Pet. C. Ct. 220.

53. The requirement of the Statute that the petition must be filed at the time of entering the appearance,

means that they must be simultaneous acts. The petition cannot be filed after an act which amounts to an appearance, even though early notice was given of an intent to move. (*Redmond v. Russell*, 12 *Johns.* 153.) As to proceedings after removal and the effect of removal, consult (*Gen. Laws of Cal.* ¶ 5,607; *Martin v. Kanouse*, 1 *Blatchf.* 149; *McLeod v. Duncan*, 5 *McLean*, 342; *Gier v. Gregg*, 4 *Id.* 202; *Kanouse v. Martin*, 15 *How. U.S.* 198; *Sayles v. Northwestern Ins. Co.*, 2 *Curt. C. Ct.* 212; *McVaughter v. Cassily*, 4 *McLean*, 351; *Clarke v. Chase*, 11 *Law Rep.* 394.) As to surrender of discharge of bail, (*Holbrook v. Seagraves*, 4 *Law Rep.* 143.) As to obtaining copies of records and proceedings, see 4 *Stat. at L.* 634; 1 *Bright.* 129.

REMOVAL BY UNITED STATES OFFICERS.

54. Suits against revenue officers, on account of acts done under color of office, may be removed—proceedings prescribed. (4 *Stat. at L.* 633; 14 *Stat. at L.* 171.) So of a collector who withholds from an informer proceeds from a forfeiture on breach of revenue laws. (*Van Zandt v. Maxwell*, 2 *Blatchf.* 421.) This right is independent of the amount in controversy. (*Wood v. Matthews*, 2 *Blatchf.* 370; S.C., 23 *Vt.* 735.) Such application must state facts sufficient to enable the Court to decide whether the case is within the provisions of the Act. (*Salem and Lowell R.R. Co. v. Boston and Lowell R.R. Co.*, 11 *Law. Rep. (N.S.)* 210.) Proceedings in such cases after removal, see *Coggill v. Lawrence*, 2 *Blatchf.* 304.

55. Suits for military arrests against any officer, civil or military, or against any other person, for an arrest or imprisonment, for any act done by virtue or

authority derived from or exercised under the President of the United States, or any Act of Congress, may be removed to the federal courts. (*Act of March 3, 1863; 12 Stat. at L. 755; 2 Bright. 198; amended, 14 Stat. at L. 46; Hodgson v. Millward, 3 Grant's Cas. 418; Commonwealth v. Artman, Id. 436.*) Trover for a mare. Plea that defendant did not take her in his private capacity, or for his own use, but as a captain in the United States Army, for its use. Where no color of authority exercised under the President of the United States or of any Act of Congress was shown, the prayer for removal to a federal court was refused. (*Short v. Wilson, 1 Bush. 350; Erfort v. Bevinos, Id. 460.*) But a like prayer was granted in *Edwards v. Ward, 2 Bush, 605.*

REMOVAL ON THE GROUND OF ALIENAGE.

56. If a suit be commenced in any court of this State, against an alien, and the matter in dispute exceeds the sum of five hundred dollars exclusive of costs, the defendant, upon petition, may have the cause removed for trial into the next circuit court or district court of the United States having the powers and jurisdiction of a circuit court. *Gen. Laws of Cal. ¶ 5,605; Matthews v. Lyall, 6 McLean, 13; Brownell v. Gordon, 1 McAll. 207.*

57. To authorize a transfer of an action, in which there are several defendants, from a state court to a United States Court, under the provisions of the Judiciary Act of 1789, on the ground of the alienage of parties defendant, all the defendants must be within the description of the persons entitled to a transfer, and all must join in the application. (*Calderwood v. Hagar, 20*

Cal. 167.) As to whether one of several defendants may alone petition, compare *Jackson v. Stiles*, 4 *Johns.* 493; *Vandevoort v. Palmer*, 4 *Duer*, 677; *Livingston v. Gibbons*, 4 *Johns. Ch.* 94; *Norton v. Hayes*, 4 *Den.* 245; *Suydam v. Smith*, 1 *Id.* 263; *Beardsley v. Torrey*, 4 *Wash. C. C.* 286; *Smith v. Rines*, 2 *Sumn.* 339; *Ward v. Arredondo*, 1 *Paine*, 410.

58. Thus, where in an action of ejectment commenced in a state court against several defendants, some of whom were citizens of the United States and of this State, and one of whom was an alien residing in the State, an application was made by the alien defendant for a transfer of the case to the United States Circuit Court, under the provisions of said Act, which was denied: *Held*, that the denial was proper. (*Calderwood v. Hager*, 20 *Cal.* 167.) So held where the action had been dismissed as to one of the defendants. (*Reed v. Calderwood*, 22 *Cal.* 463.) So, also, all defendants in an action in a state court must be aliens or citizens of another State to authorize the removal of the cause to a federal court for trial. (*Calderwood v. Braly*, 28 *Cal.* 97,) If there are two defendants, the cause cannot be removed on the application of one. *Beardsley v. Torrey*, 4 *Wash. C. C.* 286; *Ward v. Arredondo*, 1 *Paine*, 410; *Smith v. Rines*, 2 *Sumn.* 238.

59. The United States courts have no jurisdiction based upon the citizenship of the parties, over actions between aliens and aliens, but only over actions between citizens and aliens. (*Orosco v. Gagliardo*, 22 *Cal.* 83.) So, a suit brought by an alien jointly with a citizen is not within the Statute. (*Denniston v. N.Y. and New Haven R.R. Co.*, 2 *Abb. Pr.* 278, 415. Alleging that

the party is a resident is not sufficient. (*Corp v. Vermilye*, 3 *Johns.* 145.) The facts as to alienage and citizenship of defendant should appear by the writ or other papers filed in the state court. *Ladd v. Tudor*, 3 *Woodb. & M.* 325.

60. One of several parties defendant to a cause pending in one of the courts of this State filed his affidavit for its removal to the United States District Court, on the ground that he was an alien. *Held*, that it must appear that the contest was between a citizen of this State and a citizen of a foreign State. (*Welch v. Tennent*, 4 *Cal.* 203; *Greely v. Townsedd*, 25 *Id.* 604.) No appeal lies from an order made before final judgment, refusing to transfer a cause from a district court of this State to the United States Circuit Court for trial, because the defendant is an alien. *Brooks v. Calderwood*, 19 *Cal.* 124.

REMOVAL ON THE GROUND THAT THE PARTIES ARE
CITIZENS OF DIFFERENT STATES.

61. If a suit be commenced in any court of this State, by a citizen thereof, against a citizen of another State, and the matter in dispute exceeds the value of five hundred dollars exclusive of costs, the defendant may, upon petition, have the cause removed to a United States Court having the power and jurisdiction of a United States Circuit Court. *Gen. Laws of Cal.* ¶ 5,606.

62. By the Act of Congress of March 2, 1857, in controversies between citizens of different States, where the amount in controversy exceeds five hundred dollars exclusive of costs, either party may make affi-

davit that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such state court, and at any time before hearing may petition such state court for a removal of the cause to the Circuit Court of the United States, of the district where the suit is pending. (14 *U.S. Stat. at L.* 558.) (For construction of this Act, see *Fisk v. Chicago R.R. Co.*, 4 *Abb. Pr.* 453; see, also, *Act of Jul. 27, 1865*; 14 *Stat. at L.* 306.) Where in a suit concerning a title to land, either party claims under a grant from another State, he may have a removal of the cause to the United States Circuit Court in certain cases. *Act of Cong.* 1789, § 12.

63. The plaintiffs must be citizens, of the State in which the suit is brought, and all the defendants citizens of another, to authorize the removal. *Hubbard v. Northern R.R. Co.*, 3 *Blatchf.* 84; S.C., 25 *Vt.* 715; 7 *Law Rep. (N.S.)* 316; *Wilson v. Blodgett*, 4 *McLean*, 363; *Wood v. Davis*, 18 *How. U.S.* 467.

CORPORATION A CITIZEN.

64. A corporation is a citizen, within the meaning of the Judiciary Act. (*Barney v. Globe Bank*, 1 *Am. Law Reg. (N.S.)* 221.) The rule is now settled that a corporation created by the laws of a State, and transacting business there, is to be deemed an inhabitant of that State, and an averment of the facts of its creation, and the place of its transacting business, is sufficient to give the circuit courts jurisdiction. (*Louisville etc. R.R. Co. v. Letson*, 2 *How. U.S.* 497; *Denniston v. N.Y. and New Haven R.R. Co.*, 2 *Abb. Pr.* 451; *Stevens v. Phoenix Ins. Co.*, 24 *How. Pr.* 517.) But there seems to be some question where a corporation

like a mining claim is incorporated in one State, and the principal place of business, as well as the subject, is in another State. The fact that a corporation created by another State carries on business in this State—*e.g.*, the case of a railroad company authorized by a law of this State to extend its track into the latter—does not affect the rule that it is deemed a citizen of the former State. *Denniston v. N.Y. and New Haven R.R. Co.*, 2 *Abb. Pr.* 278.

No. 833.

Petition for Removal.

[TITLE.]

To the Court:

I. The petition of shows that an action has been brought in this Court against the petitioner by the plaintiff above named.

II. That this action is brought upon the following cause: [*state the nature of the cause of action.*]

III. That the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, as appears by the complaint filed therein.

IV. That the petitioner is an alien, to wit, a citizen of British Columbia, and a subject of the United Kingdom of Great Britain and Ireland [*or that the plaintiffs in this action are all citizens of this State; or that the plaintiffs are a corporation created by the law of the State of, and doing business therein, that the petitioner is a citizen of the State of Nevada, or, if they are a corporation, created by the State of, and doing business therein*].

V. That the assignor [*if there be an assignment*] of the chose in action under whom the plaintiff in this action claims [*allege his alienage or citizenship according to the fact, so as to show the jurisdiction of the Circuit Court*].

VI. That the petitioner now does for the first time enter his appearance in this action.

VII. That he hereby offers good and sufficient surety for his entering in the next circuit court for the District of the State of, on the first day of its session, copies of the process against him in this action; and also for his there appearing and entering special bail in the cause, if bail were originally requisite therein, according to the law and practice of the United States and its courts.

Your petitioner, therefore, asks that the said cause may be removed for trial into the next circuit court to be held in the district where the same is pending, to wit, into the next circuit court for the District of the State of, pursuant to the provisions of the Statute of the United States in such case made and provided; and that this Court do accept the surety offered by your petitioner, as aforesaid, and do proceed no further in the said cause. And for such further or other order or relief in the premises as may be just.

[SIGNATURE.]

[*Verification.*]

NOTE.—This form is substantially the one most in use in New York.

65. **Appearance.**—*Service* of the usual notice of appearance or retainer is not an entry of an appearance within the Act. (*Norton v. Hayes*, 4 *Duer*, 245; *Field v. Blair*, 1 *Code R. (N.S.)* 361; affirming *S.C.*, *Id.* 292.) But *filing* such notice with the clerk, with the petition for

removal, is such an entry. (*Id.*) As to what other acts amount to the entering of appearance, within this rule, compare *Cooley v. Lawrence*, 5 *Duer*, 605; S.C., 12 *How. Pr.* 176; *Bird v. Murray*, *Col. & C. Cas.* 63; *Arjo v. Montiero*, 1 *Cai.* 248; S.C., *Col. & C. Cas.* 227; *Redmond v. Russell*, 12 *Johns.* 153; *Livingston v. Gibbons*, 4 *Johns. Ch.* 94; *Suydam v. Smith*, 1 *Den.* 263; *Durand v. Hollins*, 3 *Duer*, 686; *Carpenter v. N.Y. and New Haven R.R. Co.*, 11 *How. Pr.* 481; *Disbrow v. Driggs*, 8 *Abb. Pr.* 305.

66. Chose in Action.—As to what is a chose in action within this exception, and the objections that may arise where a nominal party would be necessary if the cause were transferred, see *Anderson v. Manufacturers' Bank*, 14 *Abb. Pr.* 436.

67. Signature and Verification.—The petition may be signed by the defendant's attorney, and may be verified by his agent in fact. *Vandevoort v. Palmer*, 4 *Duer*, 677.

No. 834.

Undertaking of Petitioner.

[TITLE.]

Know all men by these presents, that we, R. S., of, and T. V., of, are hereby jointly and severally held and firmly bound unto A. B. (plaintiff in the action), his executors, administrators, and assigns, in the sum of dollars, lawful money of the United States of America, to be paid to the said A. B., his executors, administrators, or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, at, this day of, in the year of our Lord 18 . . .

I. WHEREAS the above-named A. B. has commenced an action in the Court against C. D.

II. And whereas the said C. D. has entered his appearance in such action in said court, and at the same time has filed his petition for the removal of the cause to the United States Circuit Court for the District of

Now, therefore, the condition of the above obligation is such that if the said C. D. shall enter in said Circuit Court [*or District Court*], on the first day of its session, copies of the process against him in said cause, and shall also then and there appear and enter special bail in the cause, if special bail was originally requisite therein according to the law and practice of the United States and its courts, then these presents and obligation shall be void, otherwise to remain in full force [*or state facts according to the rule or practice of the U.S. courts*].

[*Acknowledgment and Justification.*]

68. Amount of Bond.—The amount of the bond is not prescribed; it must be fixed with regard to the cause of action. (See *Gen. Laws of Cal.* ¶ 5,606.) Where no bail was required, a bond in the penalty of \$1,000 is amply sufficient, though the damages were laid at \$14,000; though it would be otherwise if the defendant had been held to bail. *Blanchard v. Dwight*, 12 *Wend.* 192.

69. Essentials of Bond.—It is essential that the bond be several, not merely joint. (*Roberts v. Canington*, 2 *Hall*, 640.) It is not essential that the petitioner should be one of the obligors in the bond. (*Vandevoort v. Palmer*, 4 *Duer*, 677; see *Gen. Laws of Cal.* ¶ 5,606.) The bond need not be conditioned for the appearance of other defendants who had not been served with process, and who do not unite in the application. *Suydam v. Smith*, 1 *Den.* 263; *Vandevoort v. Palmer*, 4 *Duer*, 677.

70. Justification.—Instead of adding an acknowledgment and justification, it seems to be regular to offer the bond and leave it to the

Court to order a reference to ascertain the sufficiency of the sureties. (*Suydam v. Smith*, 1 *Den.* 263.) In California, it is made the duty of the *Court* to accept the surety. *Gen. Laws of Cal.* 5,606.) So, also, in the case of a citizen of New Jersey, sued in a state court of New York. *Kanouse v. Martin*, 14 *How. U.S.* 198.

71. Stay of Proceedings.—In California, after the acceptance of the surety, the Court can proceed no further in the cause; and all subsequent proceedings which may be taken or had in such court shall be void, and of no force and effect whatever. *Gen. Laws of Cal.* 5,606.

No. 835.

Notice of Offer to be Indorsed on Foregoing Bond.

[TITLE.]

To, plaintiff's attorney:

Take notice that the within is a copy of a bond which the defendant in this action hereby offers to give upon the removal of this cause to the Circuit Court [*or* District Court] of the United States for the District of

[SIGNATURE.]

[DATE.]

NOTE—It is generally the practice to tender the bond when the motion is made, or rather, when the petition and notice is filed.

72. Offer and Service of Bond.—A sufficient bond must be offered at the time pointed out in the act, and cannot be afterwards amended in substance. *Roberts v. Canington*, 2 *Hall*, 640.

*No. 836.**Notice of Motion.*

[TITLE.]

To, plaintiff's attorney:

Take notice, that upon the petition and appearance of the defendant, of which a copy is hereto annexed, and which were on, etc. [*or* upon the petition, a copy of which is hereto annexed, and which, together with the petitioner's appearance herein already served on you, was, on, etc.] filed in this Court, and upon the bond of the petitioner and his sureties [*or* the bond on behalf of the petitioner], a copy of which is also annexed, defendant will, on, at, at the hour of, move the Court that said cause be removed from this Court to the Circuit Court of the United States for the District of

73. Opposing Motion.—The plaintiffs may oppose the motion upon the moving papers, or with new affidavits also, but after the order granting the petition has been made the jurisdiction of the state court is gone, and that court has no power to vacate its order. *Livermore v. Jenks*, 11 *How. Pr.* 479.

74. Notice.—The application should be on notice, or an order to show cause. (*Disbrow v. Driggs*, 8 *Abb. Pr.* 305, *n.*) But compare (*Illius v. N.Y. and New Haven R.R. Co.*, 13 *N.Y.* 597), where an order was made *ex parte*.

*No. 837.**Order to Show Cause.*

[TITLE.]

To, plaintiff's attorney:

The defendant having this day entered an appearance in this cause, and at the same time filed a petition praying for the removal of this action to the Circuit Court of the United States for the District of California, pursuant to the Act of Congress of the United States in such case made and provided, and offered the surety as therein provided by a bond now filed, it is ordered that the plaintiff show cause on, the day of next, before this Court, at the opening of court on that day, or as soon thereafter as practicable, why the prayer of said petition should not be granted, and in the mean time and until the hearing of said petition, let all proceedings on the part of the plaintiff herein be stayed.

E.D.,

District Judge.

[DATE.]

*No. 838.**Order for Removal of Cause to United States Court.*

[TITLE.]

Upon reading and filing the petition of John Smith, the defendant in the above entitled action, and upon filing the bond, and good and sufficient, sureties having been offered by the said defendant in the premises, and the same being by me, the Judge of said District Court, duly accepted, it is hereby ordered that no further proceedings be had in this cause, and the removal of the

same to the Circuit Court of the United States for the District of California, to be held in and for the District of California; be, and the same is hereby allowed and ordered, in accordance with the aforesaid petition, and the Statute of the United States in such case made and provided.

[SIGNATURE.]

[DATE]

75. Election of Circuit.—Where there are two circuits in the State, the petitioner has not a right to elect as to which the cause shall be removed to. (*Norton v. Hayes*, 4 *Den.* 245.) It must be removed into the next circuit court of the United States, or District Court of the United States, having circuit court powers and jurisdiction. (*Gen. Laws of Cal.* ¶ 5,606.) But the Court may consider his convenience in determining the question. (*Suydam v. Smith*, 1 *Den.* 263.) But in California there is but one circuit.

76. Injunction, Effect on.—Neither an outstanding injunction, nor a motion for an attachment for its violation, prevents the removal of the cause. (*Byam v. Stevens*, 4 *Edw.* 119.) But the injunction falls where the removal is ordered; (*McLeod v. Duncan*, 5 *McLean*, 342; though this is doubted in *Liddle v. Thatcher*, 12 *How. Pr.* 294;) in which case, however, it was held that where an injunction is outstanding this clause is proper to prevent such effect.

77. Mandamus.—The Supreme Court of California has no jurisdiction to grant a suit of mandate to compel the judge of a district court to proceed with the trial of an action commenced therein, in which an order has been made by said District Court, directing the cause to be transferred to the Circuit Court of the United States for trial, for the alleged reason that the parties thereto are citizens of different States; (*Francisco v. Manhattan Ins. Co.*, 36 *Cal.* 283;) the subject matter being in the jurisdiction of the said District Court.

78. Removal Refused.—A suit in equity to enjoin a suit, at law is in reality an equitable defense, and its removal may be refused. (*Rogers v. Rogers*, 1 *Paige*, 183.) A summons to show cause why a debtor, not served in the original action, should not be bound by the

judgment, is regarded as a further proceeding rather than a new action, and a removal cannot be granted unless the plaintiff is an alien, or all of the several defendants are citizens of another State from the plaintiff. *Fairchild v. Durand*, 8 *Abb. Pr.* 305; see *Brightly's Digest*, 12.

79. Surety Approved.—It is proper that the order should declare the surety approved. *Vandevoot v. Palmer*, 4 *Duer*, 677.

PART SIXTH.

PROVISIONAL REMEDIES.

CHAPTER I.

ARREST AND BAIL.

1. The laws of the land and an enlightened public opinion long since decreed that there should be no more imprisonment for debt, unless there was some act connected with the *contracting* of the debt or *avoiding its payment* which tainted the transaction with fraud. (*Const. of Cal.*, Art. i., §15.) In this age the mere misfortune of poverty excites sympathy, instead of provoking the additional misfortune of the jail. It will thus be seen that the subject of arrest and bail, in matters pertaining to civil actions, is very limited. It is provided by our Statute, that *no person shall be arrested in a civil action, except as prescribed by this Act. Practice Act, § 72.*

2. The Statute proceeds to designate *five* instances in which a defendant may be arrested in a civil action, which will be referred to hereafter, and the practitioner must remember two facts when he attempts to get an order of arrest in a civil action. *First*, This Statute will be strictly construed, and if there be a question of

doubt about defendant's guilt, the courts will incline to innocence and favor the defendant; and, *Second*, In no case should a defendant be arrested in a civil action, unless it is clear that the facts charged will bring him within the letter as well as the spirit of the Statute.

3. This extraordinary remedy was only intended for extreme cases. It should be invoked only as a punishment for dishonesty, and hence it is the rule that in the affidavit prescribed by Sec. 75 of the Practice Act, the mere statement in the language of the Statute showing defendant's guilt is not enough; the facts must be *clearly* and *pointedly* stated, not the *result* of facts which are *assumed* to exist, but the history of the fraudulent acts must be given, and given with particularity, and in detail no form of affidavit can be given which will fit all cases, or even more than one, except only those portions which are purely formal.

4. But it has been held that, to entitle a party to the remedy of arrest, it is not necessary that he should know positively the commission of a fraud. It is sufficient if the circumstances detailed would induce a reasonable belief that a fraud was intended. (*Southworth v. Resing*, 3 *Cal.* 378.) Hence arrest is maintainable by the assignee of a cause of action. (*Grocers' Nat. Bk. v. Clark*, 32 *How. Pr.* 160.) An original cause of action is merged in a foreign judgment in an action for fraud, and defendant is not arrestable in an action on such judgment. (*Mallory v. Leach*, 23 *How. Pr.* 507; 14 *Abb. Pr.* 449, n.) But a vacated judgment is no bar to arrest for the same cause, though ordered to stand as security. (*Mott v. Union Bank*, 8 *Bosw.* 591.) As to how far original remedy

for fraud may be waived by a subsequent negligence or compromise, see (*Adams v. Sage*, 28 *N.Y.* 103.) *Held*, that fraud in incurring original indebtedness is not merged in taking the debtor's note or check, but that he may be arrested after its dishonor. (*Shipman v. Shafter*, 14 *Abb. Pr.* 449; see, also, *Murphy v. Fernandez*, 10 *Bosw.* 665.) But bringing an action on the check of two joint debtors invalidates an arrest of one for a separate fraud. *Woodruff v. Valentine*, 19 *Abb. Pr.* 93.

5. The provisions of Section seventy-two of the California Practice Act have reference to mesne and not to final process. (*Stewart v. Levy*, 36 *Cal.* 159.) In cases of fraud, it appears that there can be but two judgments—one against the person, and the other against the property; in the former of which the execution issues directing the officers to arrest and confine the party until the debt is paid. (*Matoon v. Eder*, 6 *Cal.* 60.) To authorize an arrest of the defendant upon execution issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment. (*Davis v. Robinson*, 10 *Cal.* 411.) When the circumstances authorizing an arrest occur subsequently to the filing of the complaint, application should be made to the Court either to amend the original or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the enforcement of the judgment sought. *Davis v. Robinson*, 10 *Cal.* 411.

PRIVILEGE FROM ARREST.

6. The privilege from arrest extends to suitors, witnesses, jurors, and officers, and to the presiding officers of the courts of justice, and protects them while in attendance upon their public duties from arrest, summons, or any other civil process. (40 *Eng. Com. Law. R.* 464; 4 *Dall.* 388; *Id.* 107; 1 *Id.* 296; 1 *Binn.* 77; 9 *Serg. & Rawle*, 150; 1 *Miles*, 236; *Andrews*, 275; 1 *N. J. R.* 366; 1 *Cox*, 142; 1 *Day*, 139; 6 *Mass.* 245, 264; 8 *Johns.* 350; 18 *Johns.* 52; *Lyell v. Goodwin*, 4 *McLean*, 29; *Geyer v. Irwin*, 4 *Dall.* 107.) But these are *common law privileges*; the statutes of the different States define these privileges.

7. The privilege of a suitor or witness extends to exemption from arrest, and no further. (*Blight v. Fisher*, *Pet. C. Ct.* 41; *McFerran v. Wherry*, 5 *Cranch C. Ct.* 677.) So with an applicant for the benefit of the Bankrupt Law. (*Anon.*, 6 *Hunt's Merch. Mag.* 355.) The privilege of a witness protects him while at his lodgings as well as in the street, going to or from the court; (*Exp. Hurst*, 1 *Wash. C. Ct.* 186;) but it does not extend after he is discharged from the obligation of the subpœna. (*Smythe v. Banks*, 4 *Dall.* 329.) As to extent of an elector's privilege—also as to waiver of privilege generally, by giving bail or appearance, (*Petrie v. Fitzgerald*, 1 *Daly*, 401.) As to extent of privilege of a policeman—being confined to the period when on actual duty, *Hart v. Kennedy*, 39 *Barb.* 186; 24 *How. Pr.* 425; 15 *Abb. Pr.* 290; reversing S.C., 23 *How. Pr.* 417.

8. Affidavit.—The affidavit shall be either positive, or upon information and belief; and when upon information and belief, it shall state the facts upon which the information and belief was founded. If an order of arrest be made, the affidavit shall be filed with the Clerk of the County. (*N.Y. Code*, § 181.) It is not sufficient to refer to the complaint, or any other paper, to show what the affidavit ought to disclose. (*McGilvery v. Moorhead*, 2 *Cal.* 607; *Draper v. Beers*, 17 *Abb. Pr.* 163.) Insufficiency of the affidavit on which the writ of arrest issues cannot be set up in defense by third parties, nor even by the defendant himself after judgment. *Matoon v. Eder*, 6 *Cal.* 57.

9. Information and Belief.—An affidavit for arrest, which avers on information and belief that the defendant has been guilty of fraud in contracting the debt, or in endeavoring to prevent its collection, in the terms required by statute, and followed by an averment of the facts on which the belief is founded, also stated on information and belief, is sufficient. (*Matoon v. Eder*, 6 *Cal.* 57.) But an affidavit grounded entirely on information and belief is bad. (*Satow v. Reisenberger*, 25 *How. Pr.* 164.) In an affidavit on information and belief, sources and nature of information must be set out, and good reason must be given why a positive statement cannot be procured, and documents relied on must be presented or copies furnished. *De Neirth v. Sidner*, 25 *How. Pr.* 419; *Potter v. Sullivan*, 16 *Abb. Pr.* 295; *City Bank v. Lumley*, 28 *How. Pr.* 397.

10. On an Award.—An affidavit of debt on award ought to state the fact of the submission to arbitration, the making of the award, and that the money was due at a day past. (*Anonymous*, 1 *Dowl. P. C.* 5.) And if the award direct the money to be paid by the defendant to the plaintiff upon demand, the affidavit must state such demand. *Driver v. Hood*, 7 *B. & C.* 494; 1 *M. & Rob.* 324; and see *Jenkins v. Law*, 1 *B. & P.* 365; *Masel v. Angel*, 6 *D. & R.* 15.

11. On Bonds.—An affidavit for so much “for principal and interest due on a bond made and entered into by the defendant,” without expressly stating the bond to be conditioned for the payment of money, is sufficient. (*Byland v. King*, 7 *Taunt.* 275; 1 *Moore*, 24.) But where the affidavit merely stated the defendant to be indebted to the plaintiff in six thousand pounds, without adding for principal and interest, on a bond in the penal sum of twenty-five thousand pounds, the court held it to be insufficient, as it did not appear what was the condition of the bond. (*Bosanquet v. Fillis*, 4 *M. & Sel.* 330; *Chambers v. Ward*, 1

Dowl. P. C. 139.) The affidavit should, at all events, state that the bond is due and payable. *Smith v. Kendal*, 7 *D. & R.* 232.

12. On Deeds.—An affidavit that the defendant is indebted to plaintiff under a deed by which the defendant covenanted to pay to the plaintiff money “at certain times and on certain events now passed and happened,” is sufficient. (*Barnard v. Neville*, 3 *Bing.* 126; 10 *Moore*, 475; and see *Lambert v. Wray*, 3 *Dowl. P. C.* 169; 1 *C. M. & R.* 576.) So in an affidavit that the defendant is indebted to the plaintiff in a specified sum, “upon a certain indenture of mortgage, by which the defendant covenanted to pay the said sum of money to the plaintiff at a certain day now past.” *Masters v. Billing*, 3 *Dowl. P. C.* 751.

13. On Guaranties.—The affidavit on a cause of action on guaranty must show the terms of the guaranty, and that the credit has elapsed. *Angus v. Robilliard*, 2 *Dowl. P. C.* 91; and see *Elworthy v. Maunder*, 5 *Bing.* 295.

No. 839.

Commencement by Executor or Administrator.

[TITLE.]

[VENUE.]

A. B., executor of the will of C. D. deceased, being duly sworn, says as follows: [*continue as in succeeding forms.*]

No. 840.

The Same—By Third Person.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I am an agent of the above named plaintiff A.B., at [*state the nature of the agency, and continue as in succeeding forms.*]

14. Third Person.—It is not absolutely necessary that deponent should show any connection between him and the plaintiff (*Holliday v. Lawes*, 3 *Bing. (N.C.)* 541; *Short v. Campbell*, 3 *Dowl.* 487; 1 *Gale*, 60; *Pieters v. Luytjes*, 1 *B. & P.* 1; *Andrioni v. Morgan*, 4 *Taunt.* 231); but where there is a connection, it is better to state it.

No. 841.

Affidavit for Order of Arrest—Departing out of the State with Intent to Defraud Creditors.

[TITLE.]

State of California }
City and County of } ss.

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above entitled action.

II. That the cause of action in this case arose after the passage of the Act of the Legislature of the State of California, entitled "An Act to Regulate Proceedings in Civil Cases in the Courts of Justice of this State," passed April 29th, 1851.

III. That it is an action for the recovery of money or damages on a cause of action arising upon a contract, and that the defendant in said action is about to depart from this State with the intent to defraud creditors.

IV. And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to wit: [*state facts.*]

[*Jurat.*]

[SIGNATURE.]

15. Departure and Intent to Defraud.—In an action for the recovery of money or damages, on a cause of action arising upon contract express or implied, when the defendant is about to depart from the State with intent to defraud his creditors, or where or when the action is for willful injury to person, to character, or to property, knowing the property to belong to another. (*Cal. Pr. Act*, § 73, Subd. 1; *N.F. Code*, § 179.) The seventy-third section of the Practice Act, which provides “that the defendant may be arrested where the notice is for willful injury to person or character,” is directly in conflict with the fifteenth section of Article one of the Constitution; (*Ex parte Prader*, 6 *Cal.* 239;) as by the Constitution, Art. one, “no person shall be imprisoned for debt in any civil action, or mesne or final process, unless in case of fraud, etc.” See *Matter of Holdforth*, 1 *Cal.* 438; *Const. of Cal.*, Art. i., § 15.

16. Facts and Circumstances.—The affidavits must state the facts and circumstances which justify the conclusion that the defendant has removed or disposed of his property, so that the Court may be able to draw it from the evidence detailed in the affidavit. (See *Smith v. Luce*, 14 *Wend.* 237, and cases there cited in note *a*; *Exp. Robinson*, 21 *Wend.* 672; *Frost v. Willard*, 9 *Barb.* 440; *Castellanos v. Jones*, 5 *N.F.* 164; compare *Donnelly v. Corbett*, 7 *N.F.* 500; *Van Alstyne v. Erwin*, 11 *N.F.* 331.

17. Fraudulent Intent.—Evidence of a fraudulent intent must depend upon the particular circumstances of each case. The declarations of the debtor are often sufficient, at least if coupled with acts of a suspicious character. (Compare *Courter v. McNamara*, 9 *How. Pr.* 255; and *Hathorn v. Hall*, 4 *Abb. Pr.* 227.) The mere fact that defendant is about to depart, although he owes debts to a large amount, is not enough. It must appear that he has removed or disposed of his property, or is about to do so, secretly. It is the secrecy which evinces the fraudulent intent. (Anonymous, 2 *Code R.* 51.) This, however, must be taken with qualification. (Compare *Courter v. McNamara*, 9 *How. Pr.* 255.) As to what is sufficient evidence of a fraudulent intent, see, also, *McButt v. Hirsch*, 4 *Abb. Pr.* 441; and *Spies v. Joel*, 1 *Duer*, 669; and see *Gary v. Williams*, *Id.* 667.

18. Torts.—Assault and battery is not a case of fraud, and persons cannot be arrested in civil actions for the same. (*Ex parte Prader*, 6 *Cal.* 239.) As to arrestability of parties in actions for will-

ful damage, see (*Niver v. Niver*, 43 *Barb.* 411; 29 *How. Pr.* 6; 19 *Abb. Pr.* 14.) But it is not proper to grant a writ of arrest for a personal tort, as of course, unless the defendant is a non-resident, or transient, or the tort is aggravated. *Davis v. Scott*, 15 *Abb. Pr.* 127.

No. 842.

*Affidavit Showing that Money has been Received by Defendant in a
Fiduciary Capacity.*

[TITLE.]

State of California
City and County of } ss.

A. B., being duly sworn, deposes and says as follows:

I. On the day of, 18..., at, I delivered to C. D., of, note broker, a promissory note for dollars, dated the ... day of, 18..., made by E. F. to my order, and indorsed by me, for sale on my account, and for no other purpose whatever.

II. I gave no authority to the said C. D. to retain any part of the proceeds of the said note for any time whatever.

III. On the day of, 18..., the said C. D. sold the said note for dollars.

IV. I have demanded the proceeds of the said note from the said C. D., but he has not paid or accounted for the same.

V. I have sustained a loss by the premises of
 dollars.

A.B.

Subscribed and sworn to }
 before me, the day }
 of, 18...

G. H.,

Notary Public.

20. Agent.—An agent who is entrusted with negotiable paper to be discounted, and who transfers it to a *bona fide* purchaser, and receives the proceeds, applying them to his own use, is liable for the money in a fiduciary capacity. (*Wolf v. Browner*, 5 *Rob.* 601.) In a suit to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal, and a refusal by him to pay. An arrest without such showing is prohibited by Section fifteen, Article one, of the Constitution. In the matter of *Holdforth*, 1 *Cal.* 438.

21. Conversion of Property.—The defendant may be arrested in an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff. (*Cal. Pr. Act*, § 73, Subd. 3.) Where the right to an arrest flows directly from the matter of the cause of action itself—*e.g.*, in an action for the wrongful conversion of personal property—the Court will not try the merits upon affidavits, and will not discharge the order unless the defendant makes out a clear case of innocence. (*Royal Ins. Co. v. Noble*, 5 *Abb. Pr. (N.S.)* 54.) There must be a fraudulent concealment to maintain arrest under subdivision third of this section. (*Jananque v. Luc*, 1 *Abb. Pr. (N.S.)* 419; *Elston v. Potter*, 9 *Bosw.* 636.) As to the proper form of security and order under this subdivision, see *Elston v. Potter*, 9 *Bosw.* 636.

22. Fiduciary Character.—The complaint should state the facts that constitute the fiduciary character, as well as its nature and extent. (*Porter v. Hermann*, 8 *Cal.* 623.) It is necessary in such a case to charge, not only that defendant received the money as agent, but that he converted it in the course of his employment as such. (*Id.*)

Where the character or capacity in which a party is alleged to have acted is essential to the charge of fraud, the character or capacity must be averred in direct and positive terms, or the charge must fall. (*Id.*) For forms of complaint see "*Fraud*," Vol. ii., pp. 417-451.

23. Grounds of Arrest.—The defendant may be arrested in an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment, or for a willful violation of duty. *Cal. Pr. Act*, § 73, Subd. 2; *N.Y. Code*, § 179.

24. Partners.—A. being owner of an invoice of goods in the city of New York, sold one-half interest therein to B., with an arrangement that the latter should proceed to San Francisco and there dispose of the same on joint account. *Held*, that this constituted a partnership between them, and that B. was not subject to arrest in an action by A. to recover a part of the proceeds of the sales. (*Soule v. Hayward*, 1 *Cal.* 345.) Section seventy-four (now 73) of the Practice Act, which provides for the arrest of a debtor in certain cases, does not apply in the case of one partner suing to recover money received by another. *Id.*

25. Who may be Arrested.—Broker misapplying funds deposited arrestable, and taking of collaterals does not change character of liability. (*Dubois v. Thompson*, 1 *Daly* 309; 25 *How. Pr.* 417.) Guardian using funds of ward arrestable. (*Wheelock v. Stewart*, 28 *How. Pr.* 89.) So, also, as to party receiving avails of goods as indemnity against his guarantee of payment. (*Chaine v. Coffin*, 17 *Abb. Pr.* 441.) Or as consignee guaranteeing payment. (*Ostell v. Brough*, 24 *How. Pr.* 274.) But mere consignee, doing business in the ordinary way as commission merchant, not arrestable. (*Duguid v. Edwards*, 32 *How. Pr.* 254.) Claim to money by third person no bar to arrest of fiduciary receiving it. (*Gross v. Graves*, 19 *Abb. Pr.* 95.) A part payment for goods by a bailee, who is to return on payment for them, does not bar an arrest in a subsequent action for their conversion. *Person v. Given*, 29 *How. Pr.* 432.

No. 843.

Affidavit for Order of Arrest of Fraudulent Debtor.

[TITLE.]

State of California,)
 City and County of) ss.

A. B., being duly sworn, says:

I. I am the plaintiff in the above entitled action. The cause of action in this case arose after the passage of the act of the Legislature of the State of California, entitled "An Act to Regulate Proceedings in Civil Cases in the Courts of Justice in this State," passed April 29th, 1851.

II. That it is an action for the recovery of money or damages on a cause of action arising upon an [express] contract, and that defendant in said action has been guilty of a fraud in contracting the debt and incurring the obligations for which the said action is brought.

III. And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to wit: [*state facts.*]

[SIGNATURE.]

[*Jurat.*]

25. Circumstances.—The practitioner cannot be too careful in specifying the particular circumstances establishing the fraud relied upon as the foundation of the order. He cannot, under Section 205, upon a motion to vacate his order, set up a ground for retaining it not put forth as the original ground of the order. *Cady v. Edmonds*, 12 *How. Pr.* 197.

26 Evidence Essential.—In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful were not

true. (*Belden v. Henriques*, 8 *Cal.* 87.) A defendant cannot be arrested for fraudulent representations in obtaining money, when the representations were made some time after the money was obtained. (*Snow v. Halstead*, 1 *Cal.* 361.) Mere proof of cause of action sufficient to maintain arrest under this subdivision; non-residence of intention to depart only material in application under Subdivision 1. *Hazlett v. Gill*, 19 *Abb. Pr.* 353.

27. Fraudulent Purchase.—Where one purchased bills of exchange on credit, for the purpose of remitting to Europe, and afterwards sold them in the market: *Held*, that as he purchased the bills with the intention to make such use of them, and knowing his inability to pay for them, the purchase was fraudulent, and that he was liable to arrest in an action for their value. (See, also, *Brown v. Montgomery*, 20 *N.Y.* 287.) Purchase with preconceived design not to pay is fraudulent, though a mere concealment of insolvency does not make it so. (*Hennequin v. Naylor*, 24 *N.Y.* 139; *King v. Phillips*, 8 *Bosw.* 603.) Not necessary that misrepresentation should be sole inducement to sale. (*Shaw v. Stine*, 8 *Bosw.* 157.) Party making representation false in fact liable for it, though at the time he did not know whether it were true or false. *Craig v. Ward*, 36 *Barb.* 377; *Sharp v. Mayor of N.Y.*, 40 *Barb.* 256; 25 *How. Pr.* 389.

28. Grounds of Arrest.—When the defendant has been guilty of a fraud in contracting the debt or incurring the obligations for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought, he may be arrested. (*Cal. Pr. Act*, § 73, Subd. 4.) For illustrations of the principles upon which orders of arrest may be granted under this subdivision, see the following cases. *Bean v. Renway*, 17 *How. Pr.* 90; *Freeman v. Leland*, 2 *Abb. Pr.* 479; *Bell v. Mali*, 11 *How. Pr.* 254; *Union Bank v. Mott*, 6 *Abb. Pr.* 315.

29. Insufficient Grounds.—An honest, though abortive purpose to continue business, and pay for the goods, is consistent with the vendee's knowledge of his own insolvency; and the purchase is not fraudulent when made with such intent, though founded in delusive and unreasonable expectations. *Nichols v. Pinner*, 18 *N.Y.* 295; compare *Mitchell v. Worden*, 20 *Barb.* 253; see, also, *Morrison v. Garner*, 7 *Abb. Pr.* 425.

30. Lex Fori.—Arrest for fraudulent representations, inducing

purchase of property in a foreign country, sustained, when property brought into State, though in such foreign country defendant would not have been arrestable; *lex fori* governs. *City Bank v. Lumley*, 38 *How. Pr.* 397.

31. Partners.—Both partners are liable to arrest in an action on a debt of the firm fraudulently contracted by one of them. (*Anonymous*, 6 *Abb. Pr.* 319, *note*; *Townsend v. Bogart*, 11 *Id.* 355; *Bull v. Melliss*, 9 *Id.* 58; *Coman v. Reese*, 12 *How. Pr.* 114.) But opposed to these cases is *Honover v. Sheldon*, 9 *Abb. Pr.* 240, and *note*.

32. Statements Sufficient.—See, as to what will be sufficient to make out a case of fraud, (*White v. Dodd*, 42 *Barb.* 554; 28 *How. Pr.* 197; 18 *Abb. Pr.* 250; *Potter v. Sullivan*, 16 *Abb. Pr.* 295; *Smith v. Countryman*, 30 *N.Y.* 655.) See, as to what is necessary to constitute an actual fraud, (*Farrington v. Bullard*, 40 *Barb.* 512, 516.) It is not necessary that the defendant should be benefited by his false representation, or in collusion with another. It is sufficient if the representation induces action by the plaintiff. (*Hubbard v. Briggs*, 31 *N.Y.* 518.) But to give action for them representations must be made to plaintiff, or with design to influence his conduct. (*Van Kleeck v. Le Roy*, 37 *Barb.* 544.) See, as to evidence of contemporaneous frauds, *Amsden v. Manchester*, 40 *Barb.* 158.

33. Variance.—If the affidavit shows a cause of action in the nature of an action on the case for obtaining goods from the plaintiffs by fraud, it is not to be inferred that the complaint will not state a cause of action of that nature, because the affidavits also allege that the action is brought to recover the price of goods sold. (*Townsend v. Bogart*, 11 *Abb. Pr.* 355.) For another form sufficient, see same cases.

34. What must Appear.—To sustain an order of arrest under this subdivision of Section 73, three things must appear: *First*, That the defendant has made representations which were false. *Second*, That he knew them to be false. (*Gaffney v. Burton*, 12 *How. Pr.* 516: see *Freeman v. Leland*, 2 *Abb. Pr.* 479; *Young v. Covell*, 8 *Johns.* 23; *Addington v. Allen*, 11 *Wend.* 374.) *Third*, That the plaintiff relied upon, and was in point of fact deceived by them. See *Freeman v. Leland*, 2 *Abb. Pr.* 479; *Wanzer v. De Baum*, 1 *E. D. Smith*, 261.

No. 844.

*Affidavit for Order of Arrest—Removal of Property with Intent
to Defraud.*

[TITLE.]

State of California,
City and County of..... } ss.

A. B., being duly sworn, says:

I. I am the plaintiff in the above entitled action.

II. The cause of action in this case arose after the passage of the Act of the Legislature of the State of California, entitled "An Act to Regulate Proceedings in Civil Cases in the Courts of Justice of this State," passed April 29th, 1851.

III. This is an action for the recovery of money or damages on a cause of action arising upon an [express] contract. That the defendant in said action did remove and dispose of said property, with intent to defraud creditors.

IV. And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to wit: [*state facts.*]

[SIGNATURE.]

[*Jurat.*]

35. Grounds of Arrest.—Defendant may be arrested when he has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. (*Cal. Pr. Act*, § 83, Subd. 5; *N.Y. Code*, § 179.) Proof of actual fraudulent intent is requisite to justify an arrest under this subdivision. *Pacific Mut. Ins. Co. v. Machado*, 16 *Abb. Pr.* 451.

No. 845.

Undertaking on Order of Arrest.

[TITLE.]

WHEREAS, The above named plaintiff has commenced, or is about to commence an action in the District Court of the Judicial District of the State of, in and for the City and County of, against the above named defendant, and is about to apply for an order for the arrest of the said defendant in said action.

Now, therefore, we, the undersigned, residents of the County of, in consideration of the premises, and of the issuing of said order of arrest, do undertake, in the sum of dollars, and promise to the effect, that if the said defendant recover judgment, the said plaintiff will pay all costs and charges that may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of dollars.

[DATE.]

O. P.,

{SEAL.}

Q. R.,

{SEAL.}

State of California,
City and County of } ss.

The persons named in, and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself, says:

I am a resident and holder within this State, and am worth double the sum specified in the said undertak-

ing as the penalty thereof, over and above all my debts and liabilities, exclusive of property exempt from execution.

[SIGNATURE.]

[*Jurat.*]

36. Justification of Sureties.—Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder, or freeholder, within the State, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with the Clerk of the Court. (*Cal. Pr. Act*, § 76; *N.Y. Code*, § 182.) The obligations of bail are assumed with reference to the law, which becomes a part of their contract, and the whole Statute must be examined to determine their liability. *Mattoon v. Eder*, 6 *Cal.* 57.

37. Qualification.—Under an order upon the plaintiff to file security for costs, an undertaking executed by two sureties is filed, the qualification of one of the sureties upon exceptions is sufficient. *Riggins v. Williams*, 2 *Duer*, 678.

38. State, etc., Exempt.—No bond is required in any suit at law or in equity, where the City of San Francisco is a party plaintiff. (*Stat. of Cal.* 1861, p. 350.) Or the State, when it is a party plaintiff. *Stat. of Cal.* 1863-4, p. 261.

39. Sufficient Surety.—Although the word *sureties* is used in the Statute, yet an undertaking with one surety may be accepted as sufficient (*Ward v. Whitney*, 8 *N.Y.* 446; *Sieff v. Shausenburgh*, 10 *Abb. Pr.* 477, n.); for it rests entirely in the discretion of the judge making the order whether or not the plaintiff shall give an undertaking with sureties. (*Courter v. McNarama*, 9 *How. Pr.* 255; *Richardson v. Craig*, 1 *Duer*, 666; see *Bellinger v. Gardner*, 2 *Abb. Pr.* 441.) The above, it will be seen, are New York decisions.

40. Under Seal.—The undertaking may properly be under seal, but this is not essential nor usual. *Thompson v. Blanchard*, 3 *N.Y.* 335; *Seacord v. Morgan*, 17 *How Pr.* 394; *Coleman v. Bean*, 14 *Abb. Pr.* 38.

41. Undertaking Essential.—Before making the order, the

judge shall require a written undertaking on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars. *Cal. Pr. Act*, § 76.

42. Who must Join.—The preponderance of authority seems to be, that the undertaking need not necessarily be executed by the plaintiff personally. (*Askins v. Hearn*s, 3 *Abb. Pr.* 184; *Bellinger v. Gardner*, 2 *Id.* 441; *Courter v. McNarama*, 9 *How. Pr.* 255; *Leffingwell v. Chave*, 10 *Abb. Pr.* 472-477, n.; *Varrault v. Diflot*, *Hoffm. Prov. R.* 50.) So, in an action brought on behalf of a foreign government appointed to sue, an undertaking to procure an arrest of defendant, executed by an agent, is good as an undertaking on the part of the plaintiff. *Republic of Mexico v. Arrangoiz*, 11 *How. Pr.* 1.

No. 846.

Acknowledgment.

[VENUE.]

I certify that on this day of, 18 . . . , A. B., C. D., and E. F., above named, to me known to be the persons described in and who executed the above, personally appeared before me, and severally acknowledged that they executed the above undertaking as their own free act, for the uses and purposes therein mentioned.

[SIGNATURE.]

NOTE.—This is not the practice in California, see form No. 844.

No. 847.

Indorsement of Judge's Approval.

I approve the within undertaking, and the sufficiency of the sureties therein named.

[SIGNATURE.]

[DATE.]

43. Must be Indorsed.—In New York, the approval of the justice who issues the order of arrest must be indorsed on the undertaking, which must be filed with the Clerk. *Code*, § 423; *Newell v. Doran*, 21 *How. Pr.* 427.

No. 848.

Order of Arrest.

[TITLE.]

The People of the State of California,
To the Sheriff of the City and County of:

The above-named plaintiff having commenced an action in the District Court of the Judicial District of the State of, in and for the County of, against the above-named defendant, and it duly appearing to me, from affidavits submitted on the part of the said plaintiff, that a sufficient cause of action exists, that the case is one of those mentioned in Section seventy-three of the Act, entitled "An Act to Regulate Proceedings in Civil Cases in the Courts of Justice of this State," passed April 29, 1851, to wit:

That the said defendant has been guilty of fraud in contracting the debt for which the said action is brought, and the necessary undertaking having been given, I, the undersigned, Judge of the said District Court, by virtue of the authority in me vested by law, do order and require you, the said Sheriff of the County of, forthwith to arrest the said defendant, if he be found in your county, and hold him to bail in said action, in the sum of dollars, and that you re-

turn this order, with your proceedings thereon, to the Clerk of the said District Court, on the . . . day of . . . , 18...

[DATE.]

G. H.,
Judge.

44. Amount of Bail.—In relation to the amount of bail, under the former practice, in actions for a money demand on contract, bail was required in double the amount of the claim; but this was subject to modification where the amount was large. (*Cromelines ads. Beldens*, 1 *Wend.* 107; *Ballingall v. Burnie*, 1 *Hall*, 237.) In other actions, the bail is altogether in the discretion of the Court, and depends upon the character of the action and the position of the defendants; whether, for example, residents or transient persons, etc. *Baker v. Swackhamer*, 3 *Code R.* 248.

45. How Served.—The order of arrest, with a copy of the affidavit upon which it is made, shall be delivered to the Sheriff, who, upon arresting the defendant, shall deliver to him the copy of the affidavit; and also, if desired, a copy of the order of arrest. (*Cal. Pr. Act*, § 78; *N.Y. Code*, § 184.) The Sheriff must file them within ten days. (*Rule xxxix*, San Francisco.) The Sheriff shall execute the order by arresting the defendant, and keeping him in custody until discharged by law. *Cal. Pr. Act*, § 79; *N.Y. Code*, § 185.

46. Issued to Sheriff.—The order must be issued to the Sheriff of the county where the defendant can be found. (*Cal. Pr. Act*, § 77.) And a defendant will be discharged from arrest when it appears that the arrest was effected by enticing him within the bailiwick of the Sheriff, in whose hands the process was, by means of false representations. *Goupil v. Simonson*, 3 *Abb. Pr.* 474; see, also, *Carpenter v. Spooner*, 2 *Sandf.* 717; and *Seaver v. Robinson*, 3 *Duer*, 622.

47. Name of Party.—Formerly it was held that an arrest of a person by a wrong name could not be justified, though he was the person intended, unless he was as well known by one name as the other. (*Griswold v. Sedgwick*, 6 *Cow.* 456; 1 *Wend.* 126; *Mead v. Haws*, 7 *Cow.* 332; *Holley v. Mix*, 3 *Wend.* 350; *Scott v. Ely*, 4 *Id.* 555; *Gurnsey v. Lovell*, 9 *Id.* 319; see 2 *Rev. Stat.* 274, § 282; *Id.* 347, § 3.) But since the Code, it is not necessary that the name of the party to be

arrested should be stated. If unknown, he may be designated as the real defendant in the suit or proceeding, and whose name is not known; or by any name. *Pinder v. Black*, 4 *How. Pr.* 95.

48. Nature of Remedy.—The writ of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process. (*Matoon v. Eder*, 6 *Cal.* 57.) As a matter of practice it is safest to award an arrest, even in cases of doubt, for the defendant is protected by his bond from abuse by the process, without which process the plaintiff may be remediless. *Southworth v. Resing*, 3 *Cal.* 377.

49. Order, by whom Made.—An order for the arrest of the defendant shall be obtained from a judge of the court in which the action is brought, or from a county judge. *Cal. Pr. Act*, § 74; *N.Y. Code*, § 180.

50. Order, what it Requires.—It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending. *Cal. Pr. Act*, § 77; *N.Y. Code*, § 183.

51. Order, when to be Made.—The order may be made whenever it shall appear to the Judge, by the affidavit of the plaintiff or some other person, that a sufficient cause of action exists; and that the case is one of those mentioned in Section seventy-three; (*Cal. Pr. Act*, § 76;) and may be made to accompany the summons, or at any time afterwards before judgment.

52. Order, when Returnable.—The order may be made returnable within a specified period after arrest, and it is not essential to name a certain day. *Continental Bk. v. De Mott*, 8 *Bosw.* 696.

53. Void Order.—Where the complaint was not filed until two days after an order of arrest had issued thereupon: *Held*, that the order of arrest was void. *Ex parte Cohen*, 6 *Cal.* 318.

*No. 849.**Return of Order—Arrest of Defendant.*

[TITLE.]

[VENUE.]

I have taken and arrested the within-named C. D., as required by the within order.

A. C.,
Sheriff of County.

*No. 850.**Return—Defendant not Found.*

[VENUE.]

The within named A. B. is not found in my county.

A. C.,
Sheriff of County.

*No. 851.**Return—One Arrested, the Other not Found.*

[VENUE.]

I have taken and arrested the within named A. B., as required by the within order; but the within named C. D. is not found in my county.

A. C.,
Sheriff of County.

*No. 852.**Return—Arrest, and Escape by Rescue.*

[VENUE.]

I have taken and arrested the within named C. D., as required by the within order, and safely kept him in my custody until divers persons, to me unknown, on the . . . day of, 18.., at, with force and arms assaulted me, and out of my custody rescued said C. D., who then and there rescued himself and escaped out of my custody, and afterwards the said C. D. is not found in said County.

A. C.,
Sheriff of County.

*No. 853.**Return that Defendant has made Deposit in Lieu of Bail.*

[VENUE.]

I have taken and arrested the within named A. B. as required by the within order, and he has deposited with me dollars, in lieu of bail in the above entitled action.

A. C.,
Sheriff of County.

NOTE.—See §§ 80, 91, *Cal. Pr. Act.*

*No. 854.**Clerk's Certificate that Deposit has been Paid into Court.*

[TITLE.]

[VENUE.]

I, J. K., Clerk of the County of, hereby certify that the Sheriff of said County has deposited in

this court the sum of dollars, as having been paid him by C. D., the defendant, in lieu of an undertaking of bail in this action.

J. K.,
Clerk of County.

No. 855.

Certificate that Bail has been Given Instead of Deposit.

[TITLE.]

[VENUE.]

I, A. K., Sheriff of the County of, hereby certify that the defendant C. D. has deposited with me an undertaking, of which the within is a copy, in lieu and instead of the money heretofore deposited with me.

A. K.,
Sheriff of County.

53. Effect of Bail.—The defendant, on arrest, by putting in bail and neglecting to move to be discharged, consents to process, and waives all previous irregularities. *Mattoon v. Eder*, 6 Cal. 57.

No. 856.

Notice of Motion to Vacate Order of Arrest.

[TITLE.]

To E. F., plaintiff's attorney:

Please take notice, that on the . . . day of, 18. . . , at the court room of said Court, at the opening of the Court, or as soon thereafter as counsel can be heard, the undersigned will move this Court to

vacate the order of arrest in this action. This motion will be based upon the affidavit hereto annexed, and upon all the papers filed and served in this action, and said motion will be made for irregularity in this, that the undertaking given to procure said order, was not filed with the Clerk of the Court [*or otherwise*], and for such other and further order as may be just.

[DATE.]

[SIGNATURE.]

54. Conversion.—In an action for a conversion, an order of arrest is not to be vacated on mere denial of plaintiff's affidavit. *Causland v. Bliss*, 4 *Bosw.* 619.

55. Facts Must be Shown.—It is well settled that the facts necessary to be shown must appear by the positive averments of the affidavits; and it is insufficient to refer to the complaint or to any other paper to show what the affidavit ought itself to disclose, although it is positively averred that such compliant or paper is true. *McGilvery v. Morehead*, 2 *Cal.* 609.

56. False Representations.—A purchaser who obtains credit by a false representation must be held to intend the legitimate consequence of his acts; and if he admits the false representation, his denial of intent to defraud is immaterial. So held on motion to vacate arrest. *Whitcomb v. Salsman*, 16 *How. Pr.* 533.

57. Insufficient Ground.—Although an order of arrest ought not to be granted upon general assertions made on information only, yet if such allegations are not met by a denial on a motion to discharge from arrest they will be taken to be true. *Wolf v. Browner*, 5 *Rob.* 601.

58. Notice Essential.—These motions must be on notice, and must be made in court, or may be before the judge who granted the order of arrest, if he is a judge of the Court. *Rogers v. McElhone*, 12 *Abb. Pr.* 292.

59. Parties.—An order of arrest should not be vacated merely on the ground that one of the plaintiffs is not a proper party. *Webber v. Moritz*, 11 *Abb. Pr.* 13.

60. Positive Denial, Effect of.—Where, on motion to vacate an order of arrest, the affidavit of the plaintiff positively and unequivocally alleges the making of false representations by the defendant, which the affidavit of the latter as unequivocally and positively denies, the defendant's affidavit should be regarded as neutralizing that of the plaintiff, who should be left to make out his case by other or further proofs. *Allen v. McCrassen*, 32 *Barb.* 662.

61. Renewal of Motion.—After a defendant has moved to vacate an order, being founded on facts extrinsic to the cause of action, and his motion to vacate it being founded only on the plaintiff's original affidavits, if such motion is denied, he should not be allowed to renew it upon opposing affidavits on his own part, especially where the order denying his motion has been affirmed on appeal. *Lovell v. Martin*, 12 *Abb. Pr.* 178.

62. Rule to Show Cause.—On a rule to show cause why the arrest of a party, ordered by the Court on an allegation of fraud, should not be vacated, the question of fact involved in it must be decided like any other fact, by the weight of evidence. *Southworth v. Resing*, 3 *Cal.* 378.

63. Vacating Order and Reducing Bail.—A defendant arrested may, at any time before the justification of bail, apply to the Judge who made the order, or the Court in which the action is pending, upon reasonable notice to the plaintiff, to vacate the order of arrest, or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made. *Cal. Pr. Act*, § 97; *N.Y. Code*, §§ 204, 205.

64. When Order will be Vacated or Bail Reduced.—If, upon such application, it shall satisfactorily appear that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appear that the bail was fixed too high, the amount shall be reduced. (*Cal. Pr. Act*, § 98.) An order of arrest should not be vacated on the ground that an action has been brought in a foreign Court against the defendant for the same cause, it not appearing that any arrest was ever made there, or would have been allowed by the practice of such court. *Arthurton v. Dalley*, 20 *How. Pr.* 311.

*No. 857.**Order Vacating Arrest.*

[TITLE.]

I. On reading and filing notice of motion and affidavit thereto annexed, and on the pleadings and proceedings in this action, on motion of E. F. counsel for the defendant and after hearing thereon:

II. It is hereby ordered that the order of arrest granted in this action, on the day of, 18.., against the defendant A. B., be vacated [and that the bail heretofore given for the defendant be exonerated from liability].

[SIGNATURE.]

[DATE.]

65. Order, where Made.—This order may be made at chambers by the judge who granted the original order. Otherwise it must be made at special term. *Dunaher v. Meyer*, 1 *Code R.* 87; *Cayuga County Bank v. Warfield*, 13 *How. Pr.* 439.

*No. 858.**The Same—On Condition that Defendant shall not Sue.*

[TITLE.]

[Commencement as in last form.]

It is hereby ordered that on defendants stipulating within days to bring no action for false imprisonment, said motion be granted, and the order of arrest heretofore granted in this action be vacated [*or that the defendant be discharged from said arrest*], with dollars costs to the defendant; otherwise, that said motion be denied, without costs.

NOTE.—It will be observed by reference to the following authorities, that a conditional order *can* be made, or rather that such *have* been made. Yet it would seem the party is either entitled or not entitled to a discharge.

66. Conditional Discharge.—The discharge may be granted conditionally, upon the defendant's stipulating not to bring an action for the arrest. (*Northern Railway Co. v. Carpentier*, 4 *Abb. Pr.* 47.) So, where the question involved in the motion to discharge the defendant is one involved in uncertainty, and about which there has been much diversity of opinion. *Alden v. Sarson*, 4 *Abb. Pr.* 102; compare *Merchants' Bank v. Dwight*, 13 *How. Pr.* 366; and *Croden v. Drew*, 3 *Duer*, 652.

No. 859.

Order Reducing Amount of Bail.

[TITLE.]

[*Commencement as before.*]

It is hereby ordered that the bail to be taken by the Sheriff on the order of arrest of C. D. in this action be reduced to dollars.

No. 860.

Notice of Motion to Discharge Defendant from Arrest—Another Form.

[TITLE.]

To A. B., plaintiff's attorney:

Please take notice, that on the day of, 18.., at the court room of said Court, at the opening of the Court, or as soon thereafter as counsel can be heard, the undersigned will move this Court that the defendant C. D. be discharged [*or that the amount of bail required by the order of arrest in this action be reduced*] from arrest in this action. Said motion will

be based on the affidavit, a copy of which is annexed, and upon all the papers filed and served in this action.

[SIGNATURE.]

[DATE.]

67. Bail, how Given.—The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the amount mentioned in the order of arrest; that the defendant shall at all times render himself amenable to the process of the Court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action. *Cal. Pr. Act*, § 81; *N.Y. Code*, § 187.

68. Discharge.—A party will be discharged from arrest where the process, though proper in form, has been issued in an improper case. (*Soule v. Hayward*, 1 *Cal.* 345.) Where a party is once arrested and discharged, he cannot be arrested again in the same action. (*McGilvery v. Moorhead*, 2 *Cal.* 607.) A voluntary release of defendant by plaintiff's attorney does not discharge the order. (*Rhoads v. Woods*, 41 *Barb.* 471.) A discharge under the Insolvent Act, after judgment, precludes a second imprisonment for the same cause in a different form. *Wright v. Ritterman*, 1 *Abb. Pr.* 428; *People v. Kelly*, *Id.* 432.

69. Discharge on Bail.—The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter. *Cal. Pr. Act*, § 80; *N.Y. Code*, § 186.

No. 861.

Undertaking of Defendant on Arrest.

[TITLE.]

Whereas, in a certain action in the District Court of the Judicial District of the State of,

in and for the City and County of, wherein A. B. is plaintiff and C. D. defendant, an order was duly made and delivered to the Sheriff of the City and County of, requiring him forthwith to arrest the said defendant, and hold him to bail in the sum of dollars, and the said Sheriff having arrested the said defendant and taken him into custody by virtue of the said order:

I. Now, therefore, we, L. M. and N. O., residing at, in the County of, the said L. M. by occupation a [merchant], and N. O., residing at, in the County of, by occupation a [carpenter], are jointly and severally bound in the sum of dollars, the amount in the said order of arrest mentioned.

II. That the said defendant shall at all times render him amenable to the process of the said Court during the pendency of the said action, and to such as may be issued to enforce the judgment herein; or that we will pay to the said plaintiff the amount of any judgment which may be recovered in the said action.

[DATE.]

[SIGNATURES AND SEALS.]

[*Justification.*]

70. Justification of Bail.—For the purpose of justification, each of the bail shall attend before the Judge or County Clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff touching his sufficiency, in such manner as the Judge or County Clerk, in his discretion, may think proper. *Cal. Pr. Act*, § 89.

*No. 862.**Examination of Bail.*

[TITLE.]

On this day of, 18 . . . , before the undersigned, J. P., Judge of [*state the court—or a justice of the peace in and for the Town of*], personally appeared L. M. and N. O., the bail of the defendant C. D. in this action, to justify pursuant to notice; and the said L. M., being duly sworn, says: [*here state testimony, inserting, if desired, the questions and answers in form.*] And said N. O., being duly sworn, says: [*etc., as above.*]

[SIGNATURE OF BAIL.]

71. Allowance of Bail.—If the Judge or Clerk find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the Sheriff shall thereupon be exonerated from liability. (*Cal. Pr. Act*, § 90; *N.Y. Code*, § 196.) The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff. *Cal. Pr. Act*, § 89; *N.Y. Code*, § 195.

*No. 863.**Allowance of Bail.*

This day appeared before me the within-named L. M. and N. O., bail for the defendant C. D. in this action, and justified as such, and I find said bail to be sufficient, and allow the same.

[*Or, that L. M., merchant, of No. Front Street, San Francisco, and N. O., banker, of No. , Montgomery Street, San Francisco, are proposed as*

bail in addition to [*or* in lieu of] R. S. and T. U., the bail already put in, and that they will justify.]

[DATE.]

[SIGNATURE.]

No. 864.

Notice of Bail Justifying.

[TITLE.]

To, plaintiff's attorney:

Please take notice, that the bail in this action will justify before M. N., a justice of this Court [*or* the County Judge of County, *or* a justice of the peace of the Town of], at, on the day of next, at o'clock in the noon.

[DATE.]

[SIGNATURE.]

72. Notice of Justification.—Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before a judge of the court, or county judge, or county clerk, at a specified time and place; the time to be not less than five, nor more than ten days thereafter, except by consent of parties. In case other bail be given, there shall be a new undertaking. *Cal. Pr. Act*, § 87; *N.Y. Code*, § 193.

No. 865.

Notice of Exception to Bail.

To the Sheriff of County:

Please take notice, that the plaintiff does not accept the bail offered by the defendant C. D. in this action,

[*and, where, there is objection to the undertaking*] and further, that he excepts to the form and sufficiency of the undertaking.

[SIGNATURE.]

[DATE.]

73. Notice—Effect of.—A notice of exception to the sufficiency of the undertaking is not sufficient as a notice of exception to the sufficiency of the sureties. *Young v. Colby*, 2 *Code R.* 68.

74. Qualifications—Exceptions.—The plaintiff may except to the bail offered by the defendant for the want of the following qualifications: *First*, Each of them shall be a resident and householder, or freeholder, within the county; *Second*, Each shall be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the Judge, or County Clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. (*Cal. Pr. Act*, § 88; *N.Y. Code*, § 194.

75. Service of Notice.—The plaintiff, within ten days after the return of the sheriff with a copy of the undertaking of bail, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking shall be filed with the Clerk of the Court. *Cal. Pr. Act*, § 86; *N.Y. Code*, § 192.

SURRENDER OF DEFENDANT.

76. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested. (*Cal. Pr. Act*, § 82; *N.Y. Code*, § 188.) The sureties on the bail bond of a defendant, arrested in a civil action, are not bound

to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. (*Allen v. Breslauer*, 8 *Cal.* 552.) A surrender within ten days after execution is a sufficient compliance with the Statute. (*Id.*) Where a party offered to surrender himself in discharge of his sureties: *Held* to be a good surrender, and a discharge of the sureties from all liability. (*Babb v. Oakley*, 5 *Cal.* 93.) Where the judgment is not such as will warrant a writ of *ca. sa.* to be issued under it, the bail will not be charged for neglecting to surrender the judgment debtor. *Mattoon Eder*, 6 *Cal.* 57.

No. 866.

Authority to Arrest Principal.

Know all men, etc., that I, L. M., the within-named bail, depute, authorize, and empower, in my place and stead, and in my behalf, O. P., of, Sheriff of, to take, arrest, seize, and surrender C. D., the within named defendant, in exoneration and discharge of my undertaking as bail for the said C. D. in said cause.

[SIGNATURE.]

[DATE.]

77. Authority.—For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest him; or by a written authority, indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail shall be exonerated, *provided* such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or sur-

render, be not made within ten days after judgment, the bail shall be finally charged on their undertaking, and be bound to pay the amount of the judgment, within ten days thereafter. *Cal. Pr. Act*, § 83; *N.Y. Code*, § 189.

78. Form.—For another form, see (*Nicholls v. Ingersoll*, 7 *Johns.* 145.) It is not essential that all the bail unite in this instrument. *In re Taylor*, 7 *How. Pr.* 212.

No. 867.

Certificate of Surrender.

[VENUE.]

I, S. T., Sheriff of the County of, hereby certify that C. D., the principal mentioned in the [within] undertaking [*or, if not indorsed, refer to the undertaking so as to identify it*], was surrendered to me by L. M. and N. O., his sureties, this day of, 18 . . ., and remained in custody.

S. T.,
Sheriff of County.

No. 868.

Notice of Motion for Enlargement of Time to Surrender.

[TITLE.]

[ADDRESS.]

Please to take notice, that on the affidavit, a copy of which is herewith served, the undersigned will move this Honorable Court, on the day of next, at o'clock, A.M., at, or as soon thereafter as counsel can be heard, that the undersigned, bail of the defendant C. D. in this action, have

days further time to surrender the defendant to the sheriff in exoneration of the bail herein, and for such other or further order as may be just.

[DATE.]

[SIGNATURE.]

No. 869.

Affidavit to Support Motion for Enlargement of Time for Surrender.

[TITLE.]

[VENUE.]

L. M., being duly sworn, deposes and says:

I. I am one of the bail of the defendant C. D. in this action; that said C. D. was arrested on the day of, 18, by virtue of an order of arrest, on the ground that [*state the ground of arrest*], and that, on the day of, 18 . . ., the deponent [and N.O.] became bail for said defendant, by giving an undertaking, of which a copy is hereto annexed.

II. [*State excuse for not having surrendered in season, and what means the bail took to ascertain where the principal was, and to effect his surrender.*]

III. [*State facts showing that a surrender is possible.*]

IV. That no action has been commenced against the bail, as deponent is informed and believes.

[*Jurat.*]

[SIGNATURE.]

78. Diligence.—A general statement that the bail used the utmost exertions to effect the surrender is not enough. *Baker v. Curtis*, 10 *Abb. Pr.*, 279.

79. **Exonerated by Death.**—The bail shall also be exonerated by the death of the defendant, or his imprisonment in the State Prison; or by his legal discharge from the obligation to render himself amenable to the process. *Cal. Pr. Act*, § 85.

CHAPTER II.

ATTACHMENT.

1. The plaintiff, at the time of issuing his summons, or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment. (*Cal. Pr. Act*, § 120.) The process of attachment is a creature of statute, and is a remedy only given in cases of indebtedness arising upon contract; (*Griswold v. Sharpe*, 2 *Cal.* 17;) and is only given by the Statute of this State to those contracts for the payment of money which are made in or are payable in this State; (*Dutton v. Shelton*, 3 *Cal.* 206;) and not secured by a mortgage, lien, or pledge, upon real or personal property, or, if so secured, when such security has been rendered nugatory by the act of the defendant; or, *Second*, In an action upon a contract, express or implied, against a defendant not residing in this State. *Cal. Pr. Act*, § 120.

2. It is not a distinct proceeding in the nature of an action *in rem*, but is a proceeding auxiliary to an action at law, designed to secure the payment of any judgment the plaintiff may obtain. (*Low v. Adams*, 6 *Cal.* 277.) It has been held that where property in the hands of a third

person is arrested on a claim to a specified lien upon it that constitutes the suit a suit *in rem*, it is not a foreign attachment, whether the third person holds the property as owner of it in his own right, or as trustee of the debtor. (Reed *v.* Hussey, 1 *Blatchf. & H.* 525.) A judgment *in rem* binds the thing itself as against all the world, but in a case in which the law requires that parties shall be brought before the court, the sentence binds those only who are parties. (Mankin *v.* Chandler, 2 *Brock. Marsh.* 125.) The decisions here referred to were made under the peculiar statutes of the States where rendered.

3. It is well settled that such proceedings are statutory and special, and must be strictly pursued, and when a party relies upon his attachment lien as a remedy, he must strictly follow the provisions of the attachment law. (Roberts *v.* Landecker, 9 *Cal.* 262.) So, it has been held by the United States Court that under the attachment law a new right is created, but no practicable remedy is prescribed. (*Id.*; compare Fisher *v.* Consequa, 2 *Wash. C. Ct.* 382; Picquet *v.* Swan, 4 *Mas.* 443; James *v.* Jenkins, *Hempst.* 189.)

4. An attachment issued before the issuance of the summons in the suit is void, and the subsequent issuance of the summons cannot cure it. (Low *v.* Henry, 9 *Cal.* 538.) Although under our Code a writ of attachment cannot properly issue until after the commencement of the suit to which it is only auxiliary, still there seems to be no valid objection to a complete preparation of all the papers requisite to the writ before or at the same time the complaint is prepared, so that the affidavit and undertaking in attachment be not filed in advance of the original complaint, and the writ not issued in ad-

vance of the summons and certified copy of the complaint to which it is incident. *Wheeler v. Farmer, Cal. Sup. Ct., Jul. T., 1869.*

5. An attachment issued before the maturity of the debt is, *prima facie*, void as against a subsequent attachment. (*Patrick v. Montader, 13 Cal. 434.*) An attachment issued upon a debt not due is void as against creditors whose rights are injuriously affected by it. (*Davis v. Eppinger, 18 Cal. 378.*) And a subsequent attaching creditor cannot, by intervention, postpone the lien of the first attachment to his own, unless the plaintiffs in the first action fraudulently commenced their action. *Coghill v. Marks, 29 Cal. 673.*

6. Where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors subsequently attaching cannot complain that the suit was prematurely brought. (*Patrick v. Montader, 13 Cal. 434.*) The decision in this case goes upon the ground that the debt on which the attachment issued was *equitably due*, and, hence, does not conflict with the rule laid down here. (*Davis v. Eppinger, 18 Cal. 378.*) An officer attached property claimed by A. under a sale from the defendant in an attachment suit. Judgment was recovered by the plaintiff in the attachment suit, and A. sued the officer. *Held*, that the officer might show that the sale to A. was in fraud of creditors. *Pease v. Anderson, 44 Ill. 218.*

7. **Administrator.**—After the decree of distribution, money in the hands of the administrator, distributed to an heir or devisee, may be garnished by a creditor of the distributee, or may be reached by proceedings supplementary to execution. *Estate of Nerac, 35 Cal. 392.*

8. Corporations.—The Code of Procedure does not authorize the issuing of an attachment as a provisional remedy against a *domestic* corporation. *Ferrier v. American Glass Silvering Co., Ante*, 419.

9. Foreign Corporations.—By the common law, foreign corporations and non-resident foreigners cannot be served with process by any of the courts of common law, nor can their property be attached to compel their appearance. This authority results from special custom or statute provisions. 16 *Johns.* 5; *Clark v. N. J. Steam Nav. Co., 1 Story*, 531.

10. Sheriff.—The ex-sheriff could only be garnisheed as a private individual. *Craham v. Endicott, 7 Cal.* 144.

11. Tenant in Common.—A sheriff, having an attachment against V., may levy on his interest in the grain; and, to effect this, may take and retain possession of the entire quantity of grain; but he can sell under the execution on the judgment that may be recovered in the action only the individual one-third interest of V., the purchaser at the sale becoming tenant in common with B. (*Bernard v. Hovious, 17 Cal.* 541.) Where R. worked L.'s farm on shares for a term expiring Oct. 1st, 1866, and on that day L. took possession of one room in the house, leaving R. and his family living in the house as before, and commenced collecting pay for the pasturage of cattle on the farm, and the grain owned in common having been threshed after the term was placed in two separate bins in the barn, and while it was there R. sold his share, which was in one of the bins, to L., but there was no other delivery except that R., going with L. to the barn, said in the presence of a witness, "Here is the grain I have sold you," and R. continued to keep a key of the barn in which he also continued to keep his horse as before: *Held*, that there was no such delivery of the grain as to take the sale out of the Statute of Frauds or protect the property as that of L. from attaching creditors of R. (*Lawrence v. Burnham, 4 Nev. Rep.* 361.) Attachment in suit of B. & Co. v. V., Y. and L. as firm of V. & Co., under which defendant as sheriff seized plaintiff's stock in trade, claiming that L. was partner of plaintiff: *Held*, that in an action by plaintiff against sheriff for damages, proof of injury to plaintiff's business as a merchant was inadmissible as a criterion of damages. *Dexter v. Paugh, 18 Cal.* 373.

WHAT MAY OR MAY NOT BE ATTACHED.

12. Assignment, Effect of.—A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. (*Walling v. Miller*, 15 *Cal.* 38.) After the delivery and presentation of an order, the debt due by the drawee cannot be reached on attachment issued by the creditors of the drawer. As against any attempt by them to enforce its payment upon any such proceeding, the order is an effectual protection, as it is also against the suit of the assignor to collect the amount, unless such suit is prosecuted for the benefit of the assignee. (*Wheatley v. Strobe*, 12 *Cal.* 92.) Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of C. attached the coin, by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C's share of the coin. *Held*, that the plaintiff was entitled to the coin; that the dust in defendant's hands was in the constructive possession of all the five owners, C. having no conclusive interest in any part until it was converted into coin, and divided among the owners; that C's right in the dust was a *chose in action*, which he could assign by order in favor of the purchaser or assignee, and after such order neither C. nor his creditors could claim any right to the money; that the Statute of Frauds has no application to a case like this. (*Walling v. Miller*, 15 *Cal.* 38.) Notice to the judgment-creditor of an assignment of chattels, where possession has never been taken under the assignment, does not affect the right of the sheriff to seize the property in execution as the property of the assignor. And it *seems* it does not render the creditor liable for directing the seizure of the goods. *Meeker v. Wilson*, 1 *Gall.* 419.

13. Contingent Demand. A contingent demand, while the contingency exists, is not attachable. (*Bates v. New Orleans etc. R.R. Co.*, 4 *Abb. Pr.* 72; 13 *How. Pr.* 516.) In Massachusetts, under the trustee laws, it has been *held*, that the wages of a sailor, being contingent upon the arrival of the ship, are not a debt until the ship has arrived, and therefore, until then, are not attachable. (*Wentworth v.*

Whitmore, 1 *Mass.* 471.) Money due to a seaman for wages is not attachable in the hands of a purser. (*Buchanan v. Alexander*, 4 *How. U.S.* 20; compare *Averill v. Tucker*, 2 *Cranch C. Ct.* 544.) The law of Louisiana, although it allows an attachment in certain cases, for debts not yet due, does not apply to debts resting in mere contingency, and is confined in its operation to absconding debtors. *Black v. Zacharie*, 3 *How. U.S.* 483.

14. Damages for Collision.—In an action to recover damage for collision, there being no indebtedness arising upon contract, an attachment cannot issue. *Griswold v. Sharpe*, 2 *Cal.* 24.

15. Debt.—All debts due the defendant may be attached. (*Cal. Pr. Act*, § 124.) An attachment may be issued on a debt contracted at any time since the passage of the Practice Act, April 29th, 1851. (*O'Connor v. Blake*, 29 *Cal.* 312.) The words "made after the passage of this Act," in the Act concerning attachments, are not limited to debts contracted after the amendment of the Act in 1860, but refer to the Act as passed in 1851. (*Id.*) A debt due from a debtor not within the State, to a creditor also not within the State, is not liable to attachment, in New York, although the evidence of the debt be within the State. (*Story's Conf. Laws*, §§ 362, 399; 10 *Mass.* 343; *Bates v. New Orleans, Jackson, and Great North. R.R. Co.*, 4 *Abb. Pr.* 72; *S.C.*, 13 *Abb. Pr.* 516.) Bonds of a railroad company, in hands of an agent to be sold, are not subject to attachment. *Coddington v. Gilbert*, 17 *N.Y.* 489.

16. Equitable and Legal Demand.—An equitable demand cannot be garnisheed—garnishment reaches only legal debts, which the defendant in the attachment could enforce in his own name. (*Hassie v. G. I. W. U. Cong.* 35 *Cal.* 378.) Unless the defendant in the attachment could have maintained, under the practice at common law, an action of debt or *indebitatus assumpsit* against the garnishee at the time the process of garnishment was served upon him, the garnishee process does not make the garnishee liable to the plaintiff in the attachment. (*Hassie v. G. I. W. U. Cong.*, 35 *Cal.* 378.) And as a person cannot split the demand into distinct parts, and maintain separate actions upon each; by parity of reasoning he cannot by an assignment enable others to do it. And an entire demand so assigned cannot be attached in the hands of a debtor at the hands of a creditor of the assignee. (*Grain v. Aldrich*, *Cal. Sup. Ct.*, *Jul. T.*, 1869; citing *Marziou v. Pioche*, 8

Cal. 536; *Hunter v. Porter*, 23 *Id.* 385; *Mandeville v. Welsh*, 5 *Wheat.* 277; *Smith v. Jones*, 15 *Johns.* 229; *Willard v. Sperry*, 16 *Id.* 121; and *Hassie v. G. I. W. U. Congregation*, 35 *Cal.* 378.) Where A. contracted with B., in writing, to construct a building for him, B. agreed to pay a certain sum therefor, payable in installments as the work progressed, and C. then contracted with A. to do a part of the work for a sum fixed to be paid in installments as his work progressed, and A. assigned to C. a part of the money to fall due on B's. contract equal to the sum to be paid C.: *Held*, that no such legal demand existed in favor of C. against B. as was liable to garnishment by C's. creditor. *Hassie v. G. I. W. U. Cong.*, 35 *Cal.* 378.

17.—Foreign Debt.—A debt due for merchandise sold in Boston to residents of San Francisco, and forwarded to the latter, they stipulating to pay by remitting funds to Boston, is not the subject of an attachment under the Act of the twenty-ninth of April, 1851. *Dutton v. Shelton*, 3 *Cal.* 306.

18. Goods in Transit.—Goods in transit are not liable to attachment, in a suit against a corporation. (14 *Wend.* 31; 13 *Barb.* 372; *Ang. on Cont.* § 495; *Bates v. New Orleans etc. R.R. Co.*, 4 *Abb. Pr.* 72; *S.C.*, 13 *How. Pr.* 516.) This right of stoppage *in transitu* is paramount to any lien on the goods claimed by third persons through the purchaser, and may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendée. *Blackman v. Pierce*, 23 *Cal.* 508.

19. Lien of Contractor.—The lien of a sub-contractor filed, and notice given to the owner of a building, within thirty days after the completion of the work, under the Act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor, after the work was commenced, and before the filing and serving notice of lien. *Tuttle v. Montford*, 7 *Cal.* 358.

20. Money in Bank.—The cashier of a bank is not liable as garnishee of the deposit by the debtor, for the cashier is not the debtor of the depositor. (*Lewis v. Smith*, 2 *Cranch C. Cl.* 571.) An agent deposited money of his principal in his own name. The fund was attached by a creditor of the agent, and immediately afterwards notice of ownership was given by the principal. *Held*, that the attached

was in no better position than the agent making the deposit. *Farmers' and Mechanics' Nat. Bank v. King*, 57 *Penn. Stat.* 202.

21. Money in Custody of the Law.—Money deposited with the Sheriff by a defendant, to procure the release of an attachment, is in the custody of the law, but when the parties, by a mutual agreement, take it out of the hands of the Sheriff, without any order or permission of Court, and loan it out to third parties, these parties are not the bailees of the Sheriff, and the money ceases to be in the custody of the law, and can only be reached on proceedings supplementary to execution, in the same manner as other debts are reached. (*Hathaway v. Brady*, 26 *Cal.* 586.) Money in the hands of the Sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment. (*Clymer v. Willis*, 3 *Cal.* 363.) Property in the custody of the law, or in the hands of a receiver appointed by a competent court, is not liable to seizure, without an order from the Court having the charge thereof. *Yuba Co. v. Adams*, 7 *Cal.* 35; *Adams v. Haskell*, 6 *Cal.* 113.

22. Money in Hands of Bailee.—A party placing money in the hands of another, for the purpose of making a bet on an election, in the name of the bailee, but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the purpose for which it was deposited. (*Hardy v. Hunt*, 11 *Cal.* 343.) Nor does he part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains, as between him and the principal, the money of the principal. (*Id.*) Nor can an attaching creditor of the bailee, levying on the money in the hands of a stakeholder, with whom it has been deposited by the bailee, claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor has not been misled by acts or declarations of the bailor, nor had he given credit to the bailee by reason thereof. *Id.*

23. Mortgage Lien or Pledge.—The policy of the law is that a creditor holding a security by way of "mortgage lien or pledge, upon real or personal property," shall not resort to the summary process of attachment until he has exhausted his security. But such lien or pledge must be of a fixed, determined character, capable of being enforced

with certainty, and depending on no conditions. (*Porter v. Brooks*, 35 *Cal.* 199.) The possessory right of a mortgagor may be attached, but when the possessory right fails, the right to detain under the attachment ceases. (*Fairbanks v. Bloomfield*, 5 *Duer*, 434.) The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession, as against the mortgagee; until foreclosure. *Halsey v. Martin*, 22 *Cal.* 645.

24. Partnership Property.—Co-partnership property cannot be seized on attachment against one partner. (*Stoutenburgh v. Vandenburg*, 7 *How. Pr.* 229; *Sears v. Gearn*, *Id.* 383.) Upon an attachment against the property of one of several co-partners, the Sheriff may seize the leviable property of the co-partnership, take it into possession, and sell defendant's interest in so much thereof as is necessary. (12 *Wend.* 127; 24 *Id.* 389; 2 *Hill*, 47, *note*; 11 *How. Pr.* 46; 5 *Black.* 337; 6 *Munf.* 110; 15 *Johns.* 179; *Drake on Att.* § 237; *Goll v. Hinton*, 8 *Abb. Pr.* 120; *Horgonan v. Dettleback*, 11 *How. Pr.* 46; *Matter of Smith*, 16 *Johns.* 102.) A levy on the partnership property where some of the partners were non-residents was sustained. *Brewster v. Honigsburger*, 2 *Code R.* 50.

25. Pledged Property.—By the laws of Indiana, all the interest of a mortgagee, pledgee, or assignee of personal property is liable to be levied on and sold by execution, and the same interest may be reached by an attachment. (5 *Blackf.* 320; *Gibson v. Stevens*, 3 *McClean*, 531.) Under the laws of Massachusetts, property pledged, and on which the party has a lien, is not liable to the trustee process of attachment. (1 *Pick.* 389.) The pledgee has a special property in the pledge, and is not bound to deliver it until his encumbrance is discharged. (*Picquet v. Swan*, 4 *Mas.* 443.) So of goods consigned as security. (3 *Salk.* 290; 1 *Ld. Raym.* 271; 3 *Barn. & Ald.* 382; 1 *Binn.* 109; *Abb. on Shipping*, 216; *Long on Sales*, 293; *Grover v. Brien*, 8 *How. U.S.* 429.) So of the holder of warehouse receipts. (1 *Pet.* 445; 1 *Atk.* 160; 2 *Barn. & Ald.* 131; 2 *Term R.* 465; 5 *Johns.* 335; 6 *Rand.* 473; 6 *Conn.* 277; 5 *New Hamp.* 571; 2 *Pick.* 599; 2 *Kent Comm.* 499; *Story on Sales*, § 311.) See, also, *Gibson v. Stevens*, 8 *How. U.S.* 384; *Balderstein v. Manro*, 2 *Cranch C. Ct.* 623.) Yet if the lien be removed by the lienor, the objection does not lie in the mouth of the debtor. (*Meeker v. Wilson*, 1 *Gall.* 419.) So, a mortgagee may waive his lien, and attach the same property, in a suit at law. (*Whitney v. Farrar*, 51 *Me.* 418.) Chattels in possession of

a pledgee, goods in possession of a consignee, cannot be attached for a debt of the pledgor. (*Brownell v. Carnley*, 3 *Duer*, 9; *Kuhlman v. Orser*, 5 *Id.* 242.) Under the provisions of Sections one hundred and twenty-five, one hundred and twenty-seven, one hundred and twenty-eight, and two hundred and seventeen, of the Practice Act, it is provided that, while the interest of a pledgor of property is subject to execution, and may be reached in the hands of the pledgee, then a third party, yet this can only be done by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge. *Treadwell v. Davis*, 34 *Cal.* 601.

26. Promissory Note.—The indebtedness of a maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. (*Gregory v. Higgins*, 10 *Cal.* 339.) Nor can such indebtedness, after the maturity of the note, be attached, unless the note is at the time in the possession of the defendant, from whom its delivery can be enforced on its payment upon the attachment. (*Id.*)

27. Property.—All property of the defendant, in this State, not exempt from execution, may be attached, and, if judgment be recovered, be sold to satisfy the judgment and execution. (*Cal. Pr. Act*, § 124.) But property of a deceased debtor is not liable to attachment. (*Patterson v. Patterson*, 1 *Cranch C. Ct.* 352; *Redfern v. Rummey*, 1 *Id.* 308; *Henderson v. Henderosn*, 5 *Id.* 469.) As to what property is exempt from attachment, see "*Execution*," *Post*.

29. Shares of Stock.—The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, may be attached. (*Cal. Pr. Act*, § 124.) Where two shareholders in a joint stock company sold to the company goods to a large amount, and afterwards, during the existence of the company, sold their stock to A., and assigned their account for such goods to B., who sued such company on said account by attachment: *Held*, that such action could not be maintained, there having been no final settlement of the partnership accounts, no balance struck, and no express promise on the part of the individual members to pay their ascertained portion. (*Bullard v. Kinney*, 10 *Cal.* 60.) Where shares of stock in a corporation have been regularly transferred as a security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, in order to attach his interest in the corporation. (Ed-

wards *v. Beugnot*, 7 *Cal.* 162.) In such a case, the corporation is no longer privy to the interest of the mortgagor, which is a mere equity in the hands of the mortgagee. *Id.*

30. Securities.—A creditor who holds, as security, an assignment from his debtor, of a claim in favor of the debtor and against a third person, is not “a debtor” of the debtor. (*Deacon v. Oliver*, 14 *How. U.S.* 610.) In this State, taking a bill before maturity as collateral security changes the legal rights of the parties, as it operates as a surrender by the creditor of the right to attach the property of the debtor, and this surrender is a sufficient consideration for the security (*Naglee v. Lyman*, 14 *Cal.* 450.) A bill of exchange may be regarded as an assignment of the funds in the drawee’s hands upon which it is drawn, and an attachment against the payee of the bill, levied on the funds, will not bind them against an indorsee of the bill suing to recover thereon, in the name of the payee. (*Corser v. Craig*, 1 *Wash. C. Ct.* 424.) A draft by the defendant upon the garnishee, in favor of a third person, before the attachment, is an assignment to the payee of the amount stated in the draft, and should be preferred to an attachment. (*Sergeant on Att.* 89; *T. Jones.* 222; 2 *Dall.* 211; 1 *Id.* 3; 4 *Id.* 279; 3 *Bin.* 394; 3 *Id.* 338; 4 *Cranch C. Ct.* 150.) The attaching creditor is in no better condition than his debtor would have been in, if the attachment had not been made. *Miller v. Frink*, 4 *Cranch C. Ct.* 451.

31. Vendor’s Lien.—A vendor’s lien for the unpaid purchase price of a tract of land, where the land has been conveyed by the vendee to a third party, before action brought against the former by the vendor, to recover said purchase price, is not of such fixed and determinate character as to bar the plaintiff in such action of the right to a writ of attachment against the property of the defendant therein. (*Porter v. Brooks*, 35 *Cal.* 199.) If the plaintiff has a vendor’s lien to secure his debt on real property out of the State, an attachment cannot issue. (*Hill v. Grigsby*, 32 *Cal.* 55.) The vendor of real estate cannot take out an attachment for unpaid purchase-money, if he can enforce a lien for such purchase-money. It matters not whether such a lien is one which courts of equity will enforce in favor of a vendor, or whether it is one created by contract. (*Id.*; see *Porter v. Brooks*, 35 *Cal.* 199.) An attachment cannot issue when the plaintiff has a lien to secure his debt, and it matters not whether the lien is one recognized by courts of equity, or is one of statutory origin and resting in contract. *Id.*

No. 870.

Affidavit for Attachment Against Resident.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above entitled action.

II. The defendant in the said action is indebted to me in the sum of dollars, of the United States, over and above all legal set-offs and counter claims, upon an express [*or implied*] contract for the direct payment of money, to wit: [*state contract briefly*], and that such contract was made and is payable in this State, and that the payment of the same has not been secured by any mortgage lien or pledge, upon real or personal property.

III. The sum for which the attachment is asked in the said actual, that is to say, the amount of indebtedness which is above stated, is an actual, *bona fide*, existing debt, due and owing to me from the said defendant, and the said attachment is not sought and the said action is not prosecuted to hinder, delay or defraud any creditor or creditors of the said defendant.

[SIGNATURE.]

[*Jurat.*]

32. Affidavit against Resident.—The affidavit for an attachment against a resident must state: *First*, That the defendant is indebted to the plaintiff (specifying the amount over and above all legal set-offs or counter claims), upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been

secured by any mortgage lien or pledge, upon real and personal property. *Second*, That the sum for which the attachment is asked is an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the defendant. (*Cal. Pr. Act*, § 121.) By Rule xlii. of the District Court for San Francisco, the affidavit must be indorsed by the Clerk.

33. Amount of Claim.—The amount of the claim must be distinctly stated. Whether attachments may issue in actions for tort, see 11 *Abb. Pr.* 349.

34. Before whom Sworn.—It is not a ground for vacating an attachment, that the affidavit on which it was obtained was sworn to before a commissioner in another State, but that no certificate of the Secretary of State was obtained, as required by the Act of 1850, ch. 270, § 4. The omission may be supplied. *Lawton v. Kiel*, 51 *Barb.* 30.

35. Bona Fide Existing Debt.—The fact that an affidavit for an attachment omits to aver that the sum for which the writ is asked is “an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the debtor,” does not render the attachment issued a nullity as against subsequent attaching creditors. *Friedenberg v. Pierson*, 18 *Cal.* 152.

36. Bonds are Contracts.—An appeal bond is a contract for the direct payment of money, within the meaning of Section 120 of the Practice Act. (*Hathaway v. Davis*, 33 *Cal.* 161.) A pledge of personal property is a “mortgage,” within the meaning of the Attachment Act, the word being there used in its most general signification, meaning “security.” *Payne v. Bensley*, 8 *Cal.* 260.

37. Contract must be Set Out.—An affidavit for attachment is insufficient which avers that the defendant is indebted to the plaintiff upon an express or implied contract. *Hawley v. Delmas*, 4 *Cal.* 195.

33. Insufficient Affidavit.—Where the affidavit failed to show that plaintiff had a cause of action against defendant, the summons, which was made returnable more than ten days before its date, was void under Section five hundred and sixty-one of the Practice Act; so, also, was an attachment issued in the cause. *Hisler v. Carr*, 34 *Cal.* 641.

39. Requisites of Affidavit.—As to the requisites of affidavit to obtain attachments under the Virginia Statutes of 1792, see (*Mills v. Wilson*, 2 *Cranch C. Ct.* 216.) Under the Maryland Act of 1795, see (*Birch v. Butler*, 1 *Cranch C. Ct.* 319; followed in *Kurtz v. Jones*, 2 *Id.* 433; *Bolton v. White*, 2 *Id.* 426; *Munroe v. Cork*, 2 *Id.* 465; *Draker v. Cleaveland*, 3 *Id.* 3; *Decatur v. Young*, 5 *Id.* 502; *Hard v. Stone*, 5 *Id.* 503.) An affidavit to obtain the issue of an attachment under the Code of Procedure need not allege that the defendants have property within the State, nor that the summons has been issued. The issue of summons is evidence by its delivery, together with the attachment to the sheriff. *Lawton v. Kiel*, 51 *Barb.* 30.

40. Statement, how made.—Is is settled, in Ohio, that where the ground relied on is stated substantially in the language of the Statute, and sworn to positively, this is sufficient to authorize the allowance of the attachment by the judge. *Harrison v. King*, 9 *Ohio St.* 388; *Gans v. Tompson*, 11 *Id.* 579.

No. 871.

Affidavit for Attachment against Non-Resident.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above entitled action.

II. The defendant in the said action is indebted to the said plaintiff in the sum of dollars, over and above all legal set-offs and counter-claims, and the said defendant is a non-resident of this State.

III. The sum for which the attachment is asked in the said action, that is to say, the amount of indebtedness which is above stated, is an actual, *bona fide*, existing debt, due and owing from the said defendant to the

said plaintiff; and the said attachment is not sought and the said action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendant.

40. Affidavit against Non-Resident.—*First*, That the defendant is indebted to the plaintiff (*specifying the amount as near as may be, over and above all legal set-offs and counter-claims*), and that the defendant is a non-resident of the State; and, *Second*, That the sum for which the attachment is asked is an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the defendant. *Cal. Pr. Act, § 121.*

No. 872.

Undertaking on Attachment.

[TITLE.]

I. Whereas the above named plaintiff has commenced or is about to commence an action in the District Court of the Judicial District of the State of, in and for the County of, against the above named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of dollars, besides interest, and he is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein:

II. Now, therefore, we, the undersigned, residents of the County of, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake, in the sum of dollars, and promise to the effect that if the said de-

defendant recover judgment in said action the said plaintiff will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of dollars.

[SIGNATURES AND SEALS.]

[DATE.]

State of California
City and County of } ss.

L. M. and N. O., the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says:

I am worth the sum in the said undertaking specified, as the penalty thereof, over and above all my just debts and liabilities, exclusive of property exempt from execution.

[SIGNATURES.]

[*Jurat.*]

41. Form.—For another form, consult *Gasherie v. Apple*, 14 *Abb. Pr.* 64; *Wilson v. Britton*, 6 *Id.* 97; *S.C.*, 26 *Barb.* 562.

42. Joint and Several.—On joint and several bonds, each signer is bound without the signatures of the others named as obligors, unless at the time of executing the bond he declared he would not be bound without such signatures obtained. *Sacramento v. Dunlap*, 14 *Cal.* 421.

43. To whom Payable.—It is no objection to an undertaking on attachment that it is made payable to the People of the State of California, instead of to the defendant in the suit, as the latter can sue thereon in his own name. (*Taafé v. Rosenthal*, 7 *Cal.* 514.) A mistake in the recital of the bond, as to the amount for which attachment issued, may be explained and corrected by parol. *Palmer v. Vance*, 13 *Cal.* 556.

44. Undertaking Required.—Before issuing the writ, the Clerk

shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. (*Cal. Pr. Act*, § 122.) The State or State officers are not required to give undertaking in suits, under the provisions of this Act. *Laws of Cal.* 1863-4, p. 261.

45. When Action Lies on the Undertaking.—If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to Section one hundred and twenty-three or Section one hundred and thirty-seven, or he may proceed as in other cases upon the return of an execution. *Cal. Pr. Act*, § 134.

46. When Void.—An attachment bond, executed after the writ had been levied and the attachment dismissed, is void; (*Benedict v. Bray*, 2 *Cal.* 251;) as the undertaking should precede the writ and accompany the affidavit. (*Id.*) And in suit on a void bond, the obligors cannot recover for injury sustained by the attachment. (*Id.*) Where the undertaking given on issuing an attachment from a justice's court was to the effect that plaintiff would pay all costs, etc., and the damages the defendant might sustain by reason of the attachment, "not exceeding one hundred dollars:" *Held*, that the undertaking was bad, and rendered the attachment void, because not issued in substantial conformity with the provisions of the five hundred and fifty-third section of the Practice Act. *Hisler v. Carr*, 34 *Cal.* 641.

No. 873.

Writ of Attachment.

[TITLE.]

I. Whereas the above entitled action was commenced in the District Court of the Judicial District of the State of, in and for the County of, by the plaintiff in the said action, to recover from the defendant in the said action the sum

of dollars, besides interest at the rate of
.... per cent. per month, from the day of
....., 18.., and costs of suit; and the necessary
affidavit and undertaking herein having been filed as
required by law:

II. Now we do therefore command you, the said Sheriff,
that you attach and safely keep all the property of the
said defendant within your said County, not exempt
from execution, or so much thereof as may be sufficient
to satisfy the said plaintiff's demand, as above men-
tioned; unless the said defendant give you security,
by the undertaking of at least two sufficient sureties,
in an amount sufficient to satisfy such demand, besides
costs, or in an amount equal to the value of the prop-
erty which has been or is about to be attached; in
which case you will take such undertaking, and hereof
make due and legal service and return.

WITNESS, Hon., Judge of the said District
Court of the Judicial District, this day
of, 18...

ATTEST my hand and the seal of said Court, the
day and year last above written.

C. D.,

Clerk,

By E. F.,

Deputy Clerk.

No. 874.

Indorsement on Copy of Writ of Attachment.

SHERIFF'S OFFICE,
City and County of San Francisco, }
August , 18 . . .

To A. B.:

Please take notice, that all moneys, goods, credits, effects, debts due or owing, or any other personal property, or all stocks or shares, or interest in stock or shares of the Company, in your possession or under your control, belonging to the within named defendants, or either of them, are attached by virtue of a writ, of which the within is a copy, and you are notified not to pay over or transfer the same to any one but myself.

Please furnish a statement.

C. D.,
Sheriff,
By E. F.,
Deputy Sheriff.

47. Effect of Writ.—A writ of attachment is effectual to change the title of personal property only from the time of levy. *Taftts v. Manlove*, 14 *Cal.* 47.) The lien of an attachment, having become fixed upon funds in the hands of a receiver, follows the property in the hands of his successors. *Adams v. Woods*, 9 *Cal.* 29.

48. Facts Stated.—A warrant of attachment issued in a pending action should not be set aside because the warrant, after stating the existence of the cause of action, does not state that the action is pending. If the facts are sufficient, the warrant is not void for omitting to state one of them. *Lawton v. Kiel*, 51 *Barb.* 30.

49. Writ.—To whom addressed and what to state, see *Cal. Pr. Act*, § 123.

ISSUANCE OF ATTACHMENT.

50. It is the duty of the Clerk of the Court to issue the writ upon the filing by the plaintiff of an affidavit, stating the ultimate facts in the language of the Statute, together with an undertaking in the amount and form as defined by Statute, and the Clerk has no discretionary power, but performs a ministerial duty, and the writ when granted is the original process in a special proceeding. (*Wheeler v. Farmer, Cal. Sup. Ct., Jul. T., 1869.*) The state of facts authorizing the writ must be established to the satisfaction of the judicial officer to whom the application is made. (*Wheeler v. Farmer, Cal. Sup. Ct., Jul. T., 1869*; citing *Foreman v. Waller, 13 How. Pr. 352.*) The affidavit need not state the probative facts necessary to establish the ultimate facts required by the Statute to be shown as the basis of the writ. *Wheeler v. Farmer, Cal. Sup. Ct., Jul. T., 1869.*

51. It is the duty of the clerks of the district courts to issue and deliver to the parties respectively, or to their attorneys, writs of attachment in the order in which the preliminary papers are presented to them, and the writs demanded. (*Lick v. Madden, 25 Cal. 205.*) While he is bound to issue writs of attachment in the order in which they are demanded, yet if the party who makes the first demand is not in attendance to receive his writ when completed, the Clerk is not bound in the meantime to delay the issuing of other writs against the same party. (*Lick v. Madden, 36 Cal. 208.*) When the Clerk has prepared for delivery the writ first demanded, he is bound to issue the writ of

the next comer; and if in such case the first comer is not there to receive his writ, and for that reason the next comer first delivers his writ to the Sheriff, and by that means acquires a priority, and the first comer loses his debt, the Clerk is not liable. (*Lick v. Madden*, 36 *Cal.* 208.) If the Clerk first issue the writ of attachment secondly demanded, but if, notwithstanding, he has the writ first demanded prepared and ready for delivery as soon as it is called for, he is not liable for the damages sustained by the first party, because the second obtains the first levy. *Lick v. Madden*, 36 *Cal.* 208.

SERVICE OF ATTACHMENT.

52. Upon receiving information in writing from the plaintiff, or his attorney, that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the Sheriff shall serve upon such person a copy of the writ, and a notice that such credits, or other property, or debts, as the case may be, are attached in pursuance of such writ. (*Cal. Pr. Act*, § 126.) No parol instruction of the plaintiff in an attachment or execution, respecting property seized by the Sheriff under either writ, will discharge such Sheriff from liability. The Statute is express that such instruction must be in writing; (*Sandford v. Boring*, 12 *Cal.* 539;) since the proceeding by attachment is in derogation of the common law, and the service of the writ must conform to the Statute authorizing it, or the judgment upon it is erroneous. *James v. Jenkins*, *Hempst.* 189.

53. Attachments are governed by the same rules as

executions, with respect to liability of officers and parties levying and causing to be levied. (12 *Wend.* 127; 24 *Id.* 389; 2 *Hill*, 47, *note*; 11, *How. Pr.* 46; 5 *Black.* 337; 6 *Munf.* 110; 15 *Johns.* 179; *Drake on Att.* § 237; *Fairbanks v. Bloomfield*, 5 *Duer*, 434; *Kuhlman v. Orser*, 5 *Id.* 242; *Goll v. Hinton*, 8 *Abb. Pr.* 120.) So with respect to their effecting no lien as against a *bona fide* purchaser before actual service or levy. *Kuhlman v. Orser*, 5 *Duer*, 242.

54. Corporation.—An attachment of credits in the hands of a corporation *held* sufficiently served by notice to their clerk, (*Dawson v. Dawson*, 4 *Cranch C. Ct.* 578.) Under Subdivision 5 of Section 125 of the California Practice Act, service to be made on the “agent” of a corporation must be on the “*managing agent*,” as required in the fourth subdivision of the same section of the California Practice Act, and in § 29. At common law, service of process on a corporation must be made on the president or principal officer. *Angell and Ames, on Corp.* § 637; 1 *Tidd's. Pr.* 116; *McQueen v. Middlesex Manf. Co.*, 16 *Johns.* 6. *Kennedy v. Hibernia Sav. and Loan Society, Cal. Sup. Ct., Jul. T.*, 1869.

55. Diligence of Sheriff.—It is the duty of an officer, after he has once entered upon the execution of an attachment, to complete its execution with diligence. (*Wheaton v. Neville*, 19 *Cal.* 41.) Where one writ of attachment was placed in the Sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the Sheriff not knowing the fact, and the first levy was made under the writ at one o'clock Monday morning, the Sheriff was not guilty of negligence in executing the first, no special circumstances being shown. (*Whitney v. Butterfield*, 13 *Cal.* 335.) Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for fraud, or because the defendant is about to leave the State, or remove his property, and the like. (*Id.*) The mere omission of a deputy to inform the Sheriff of having a process in hand is not such negligence as to charge the Sheriff, in case a writ last in hand was executed first. *Id.*

56. Personal Property.—A sheriff who levies a writ of attach-

ment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in the course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. (*Sandford v. Boring*, 12 Cal. 539.) The service upon the defendant, in an action to recover money, of a writ of attachment, at the suit of a third person against the plaintiff, cannot be pleaded by the defendant in bar of a recovery. The only effect of the service of the attachment is to suspend the proceedings until the determination of the suit in which it is issued. *Pierson v. McCahill*, 21 Cal. 122.

57. Presumption of Regularity.—Where a substitute sheriff (Elisor) was appointed, and the pleadings did not show that there was no sheriff or coroner, or that these officers were disqualified: *Held*, that the appointment being made by a Judge having competent jurisdiction, the presumption of the law is that he faithfully performed his duty. (*Turner v. Billagram*, 2 Cal. 520.) The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached, is sufficient *prima facie* to show a due and proper execution of the writ. *Ritter v. Scannell*, 11 Cal. 248.

58. Principal and Agent.—The assent of an ordinary agent, who had general charge of his principal's affairs during her temporary absence, will not justify the Sheriff, who holds an execution against a third person, in levying it upon property in the possession of the principal in her absence. *Fitch v. Brockman*, 2 Cal. 575.

59. Real Estate, how Attached.—Our Statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained. (*Ritter v. Scannell*, 11 Cal. 238.) Nor is it necessary, when the levy is made by posting a copy of the writ on the premises, that the return of the Sheriff should show that the premises were at the time unoccupied. (*Id.*; *O'Connor v. Blake*, 29 Cal. 312.) The deposit in the Recorder's Office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. *Ritter v. Scannell*, 11 Cal. 283.

60. Real Estate—Essential Acts.—The lien of attachment of real property is not perfected until both the acts described by statute, to wit, delivery to the occupant of a copy of the writ, or posting a copy

upon the premises if there be no occupant, and the filing of a copy with the Recorder, together with a description of the property attached, are performed. The omission of either act is fatal to the creation of the lien. (*Wheaton v. Neville*, 19 *Cal.* 41.) The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment and the deposit of a copy of the writ, together with a description of the land attached, with the County Recorder. (*Ritter v. Scannell*, 11 *Cal.* 238.) Such lien cannot be divested by the failure of the Sheriff to make a proper return of the writ.

PRIORITY OF ATTACHMENT LIENS.

61. The purpose of an attachment is to hold the property of the defendant as security for such judgment as may be rendered; (*Cal. Pr. Act*, § 120;) and when the judgment is rendered and becomes a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority thereby acquired, and this priority is maintained and enforced under the judgment. (*Bagley v. Ward*, *Cal. Sup. Ct.*, *Apr. T.*, 1859.) This is confined to real property, as the judgment does not constitute a lien upon personal property; the prior attachments become liens in the nature of a legal estate vested in the sheriff for the benefit of the creditors. *Patrick v. Montader*, 13 *Cal.* 444.

62. Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching creditors indemnified the Sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterward the party claiming the property obtained judgment against the Sheriff for the value of the property: *Held*, that recourse must be had

against the first attaching creditor for whose benefit the property was sold. (*Davidson v. Dallas*, 8 *Cal.* 227.) They do not stand in the position of joint trespassers, the seizure of the second being subject to the first. (*Id.*) The Sheriff was the separate agent of both attaching creditors, but in the order stated, and as he disposed of the property for the benefit of the first alone, he must look to him and not to the second attaching creditor. (*Davidson v. Dallas*, 8 *Cal.* 227.) It is the duty of the Sheriff to apply the money in the order of the attachments; he has no right to go back of the process and raise the question as to the validity of the attachments. *McComb v. Reed*, 28 *Cal.* 281.

63. Conflict of Laws.—By the Law of New York, an unrecorded mortgage is valid against third persons; by the law of Illinois, it is not. B. sued C. in the New York Courts, for the proceeds of goods sold in an attachment suit: *Held*, that the attaching creditor had precedence over a mortgagee, and that the judgment in the attachment suit was a bar to the action in New York. *Green v. Van Buskirk*, 7 *Wall. U.S.* 138.

64. Diligence Governs the Equities.—In a contest between the attaching creditors, all the equities are in favor of the most diligent, and an irregularity cannot be taken advantage of by a stranger to an action in which it occurs. (*Dixey v. Pollock*, 8 *Cal.* 570.) Where there are several attachments, the attachment first served on the garnishee binds the effects in his hands, although the marshal has prior attachments in his hands at the time of such service. *McCobb v. Tyler*, 2 *Cranch C. Ct.* 199; *Johnson v. Griffith*, 2 *Id.* 199; but compare *Violet v. Tyler*, 2 *Id.* 200; *Grigsby v. Love*, 2 *Id.* 413.

65. Separate Creditor.—A separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee to whom his debtor had conveyed the property, by which the latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims. Neither by his attachment nor by the agreement did the separate creditor acquire any title to or lien upon

the property as against the superior equity of a subsequently attaching creditor of the partnership. (*Burpee v. Bunn*, 22 *Cal.* 194.) The filing of a bill by one partner against his co-partners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the Court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution. *Adams v. Woods*, 9 *Cal.* 24.

66. Firm Creditor's Lien.—Where one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership remains bound for firm debts just as before the sale. The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner attaching first. (*Conroy v. Woods*, 13 *Cal.* 626.) A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution. (*Id.*) Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and before the maturity of the notes, B., apprehending that G. & Co. would fail before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment, obtained, by an arrangement with G. & Co., an ante-dated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co. *Held*, that B.'s attachment and claim was valid against the subsequent attaching creditors, the case not being one either of actual or constructive fraud. *Brewster v. Bours*, 8 *Cal.* 501.

67. Fraudulent Attachment.—Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered. (*Patrick v. Montader*, 13 *Cal.* 434.) The debt in such case is equitably due, and there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself. (*Id.*) A junior attaching creditor cannot take advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor. *Fridenberg v. Pierson*, 18 *Cal.* 152.

68. Irregular Process.—Where an attachment was issued on a

complaint, which was a printed form, with the blanks filled up by the clerk, at the request of the plaintiff, but no name signed to it till next day, and after other attachment on the same property, when it was signed by the clerk, with the name of plaintiff's attorney: *Held*, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. (*Dixey v. Pollock*, 8 *Cal.* 570.) The issue of an attachment, and the levy of the same on goods, if there is no legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized. (*Kohler v. Wells*, 26 *Cal.* 606.) An attachment regular upon its face is not void because the complaint does not set up a cause of action which warrants the issuance of an attachment. *McComb v. Reed*, 28 *Cal.* 281.

No. 875.

Return—Attachment Personal Property.

SHERIFF'S OFFICE,
of the
City and County of San Francisco. }

By virtue of the annexed writ, I duly attached all moneys, goods, credit, effects, debts due or owing, and all other personal property [*or* all stock, or shares, or interest to stocks or shares of the Company], belonging to the defendants therein named, [*or* to either of them], in the possession or under the control of the parties hereinafter named, by serving upon each of them respectively, personally, in the County of, at the times set opposite their respective names, a copy of said writ, with a notice in writing that such property was attached in pursuance of said writ, and not to pay over or transfer the said property to any

one but myself. [*Annex names of parties served, time of service, and answers of parties served.*]

[DATE.]

S. T.,

Sheriff,

By D. S.,

Deputy Sheriff.

70. Amendment.—This return cannot be amended where a third party has acquired an interest adverse to the attachment. (*Newhall v. Provost*, 6 *Cal.* 85; *Webster v. Haworth*, 8 *Id.* 21.) A mistake in the date of a sheriff's return may be amended at any time. *Ritter v. Scannell*, 11 *Cal.* 238.

71. Return Conclusive.—The sheriff's return is conclusive against the plaintiff, and his action must be for a false return. (*Egery v. Buchanan*, 5 *Cal.* 53.) Where a writ of attachment was issued on the twenty-sixth of August, and a copy delivered to the occupant of the premises, or posted upon them, on the twenty-ninth of that month, and on the same day the writ was returned, with a certificate of the sheriff's proceedings, and filed in the Clerk's Office; but no copy of the writ, with a description of the property, was filed with the Recorder until the ninth of September following: *Held*, that after the return of the writ to the clerk's office, on the twenty-ninth of August, the Sheriff had no authority to take any proceedings for the completion of the attachment, previously omitted; that the writ was authority to him only for acts performed while it remained in his possession; and hence, that another creditor of the debtor purchasing the property from the latter, on the sixth of September, took it free from any lien of the attachment. *Wheaton v. Neville*, 19 *Cal.* 41.

72. Return, when to be Made.—The sheriff shall return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto. The provisions of this chapter shall not apply to any suits already commenced, but so far as such suits may be concerned, the Act entitled "An Act to Regulate Proceedings against Debtors by Attachment," passed April 22d, 1850, shall be deemed in full force and effect. *Cal. Pr. Act*, § 141.

73. Second Attachment.—Where an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession. *O'Conner v. Blake*, 29 *Cal.* 312.

No. 876.

Order for Sale of Perishable Property.

[TITLE.]

It appearing to me, by the inventory returned to the warrant of attachment issued by me in this action, that a portion of the property seized by the Sheriff of the County of under said warrant, to wit [ten barrels of apples], is perishable:

ORDERED, that the portion of the property so specified in the inventory as perishable, be sold by said Sheriff by public auction, after days [*such time as may be reasonable under the circumstances*], previous notice of the time and place of such sale being given by him in writing, posted in three or more public places in, and by advertising the same days in the newspapers printed at

[DATE.]

[JUDGE'S SIGNATURE.]

FORM.—From Abbotts' Forms, No. 1,379.

*No. 877.**Notice of Motion to Discharge Attachment.*

[TITLE.]

To, attorney for defendant:

Please take notice, that on an affidavit, of which the within is a copy [*or of which a copy is annexed*], and on all the papers filed and served in this action, the undersigned will move the Court, at, on the day of, 18.., at o'clock in the noon, or as soon thereafter as counsel can be heard, to discharge the attachment in this action [*if for irregularity, add, upon the grounds, among others—specifying the irregularity*], and for such other or further order as may be just.

[SIGNATURE.]

[DATE]

74. Against Steamers, Boats, and Vessels.—In action against steamers, vessels, and boats, after appearance to the action of the owner, master, agent, or consignee, the attachment may on motion be discharged in the same manner and on like terms and conditions as attachments in other cases, subject to the provisions of Cal. Pr. Act, § 329, relative to the claim for wages. (See *Cal. Pr. Act*, § 327.) And the Court whose mesne or final process has made the first actual seizure will have exclusive power over its distribution, and its judgments will be regarded as complete adjudications of the subject matter of litigation. *Averill v. Steamer "Hartford," 2 Cal. 308.*

75. Notice.—A notice of motion to discharge a writ of attachment, "because the said writ was improperly issued," is insufficient. The notice should specify the grounds of the motion, and wherein it will be urged that the writ was improperly issued. (*Freeborn v. Glazier, 10 Cal. 337.*) For instances where an attachment ought not to issue, see (*Griswold*

v. Sharpe, 2 *Cal.* 24; *Dutton v. Shelton*, 3 *Id.* 206; *Low v. Henry*, 9 *Cal.* 539; *Bullard v. Kenny*, 10 *Id.* 60; *Gregory v. Higgings*, *Id.* 339; *Patrick v. Montader*, 13 *Cal.* 434; *Davis v. Eppinger*, 18 *Cal.* 378; *Hill v. Grigsby*, 32 *Cal.* 55; *Porter v. Brooks*, 35 *Cal.* 199.

76. When Motion may be Made.—The defendant may also, any time before the time for answering expires, apply on motion, upon reasonable notice to the plaintiff, to the Court in which the action is brought, or to the Judge thereof, or to a county judge, that the attachment be discharged, on the ground that the writ was improperly or irregularly issued. (*Cal. Pr. Act*, § 138.) This section of the Practice Act, which provides that the defendant may, at any time before answering, “apply, on motion, upon reasonable notice to the plaintiff, to the Court in which the action is brought, or to the Judge thereof, or to a county judge, that the attachment be discharged, on the ground that the writ was improperly issued,” does not obviate the necessity of specifying the particular points of irregularity upon which the motion will be made. *Freeborn v. Glazier*, 10 *Cal.* 337.

No. 878.

The Same—Where the Motion is Simply on Giving Security.*

[TITLE.]

To, attorney for defendant:

Please take notice, that the undersigned will move this Court, at, on the day of, 18.., at o'clock in the noon, or as soon thereafter as counsel can be heard, to discharge the attachment in this action, on giving due security.

[DATE.]

[SIGNATURE.]

77. May be Opposed by Affidavits.—If the motion be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made. *Cal. Pr. Act*, § 139.

78. Motion.—This motion can be made under the New York practice, but the practice elsewhere differs from this in some respects. That the application may be made without notice, see *Sanborn v. Elizabethtown Manufacturing Co.*, 13 *Abb. Pr.* 432.

No. 879.

Bond of Indemnity, Given to Sheriff by Plaintiff.

KNOW ALL MEN by these presents, that we, A. B. as principal, and C. D. and E. F. as sureties, are held and firmly bound unto G. H., Sheriff of the County of, State of, in the sum of dollars, to be paid to the said Sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of, 18...

WHEREAS, under and by virtue of a writ of attachment, issued out of the District Court of the Judicial District of the State of, in and for the County of, in an action wherein the said J. K. was plaintiff, and A. B. was defendant, against said defendant, directed and delivered to said G. H., Sheriff of the County of, the said Sheriff was commanded to attach and safely keep all the property of said defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand; amounting to dollars, as therein stated, and the said Sheriff did there-

upon attach the following described goods and chattels:
[*describe chattels.*]

AND WHEREAS, upon the taking of the said goods and chattels by virtue of the said writ, A. B. claimed the said goods and chattels as his property, and thereupon a jury was summoned by the said Sheriff to try such claim, which said jury have by their finding decided in favor of said claimant. And whereas the said plaintiff, notwithstanding such finding, requires of said Sheriff that he shall retain said property under such attachment and in his custody.

NOW, THEREFORE, the condition of this obligation is such, that if the said A. B., P. Q. and R. S., their heirs, executors and administrators, shall well and truly indemnify and save harmless the said Sheriff, his heirs, executors, and administrators, of and from all damages, expenses, costs and charges, and against all loss and liability which he, the said Sheriff, his heirs, executors, or administrators shall sustain or in any wise be put to, for or by reason of the attachment, seizing, levying, taking or retention by the said Sheriff, in his custody, under said attachment, of the said property claimed as afore-said, then the above obligation to be void, otherwise to remain in full force and virtue.

[ATTEST, DATE, ETC.]

[SIGNATURES AND SEALS.]

78. Character of Instrument.—An indemnity bond to the Sheriff to retain property seized under attachment is an instrument necessary to carry the power to sue into effect. (*Davidson v. Dallas*, 8 *Cal.* 227.) If several creditors levy, and those prior fail to indemnify the Sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility. *Davidson v. Dallas*, 8 *Cal.* 227.

79. Liability of Sureties.—Where the Sheriff, under a writ of attachment in the suit of plaintiff against partners, is about to levy upon the property of the firm, and a bond is executed by L. and J., as sureties, conditioned to keep harmless and indemnify the Sheriff against all damages, costs, charges, trouble and expense he may be put to by reason of the non-seizure of the property, and also “to pay whatever judgment may be rendered against said defendants;” and judgment was obtained against one only of the defendants, plaintiff failing on the trial to prove the other to be a partner: *Held*, that the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the Statute, conforms substantially to its requirements, and must be read by the light of the Statute, and interpreted according to the intention of the parties. (*Heyneman v. Eder*, 17 Cal. 433.) Such bond will be presumed to have been executed with reference to the provisions of the Statute; and as the security required by the Statute is security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants satisfies the condition to “pay whatever judgment may be rendered against said defendants.” *Heynemann v. Eder*, 17 Cal. 433.

No. 880.

Undertaking on Release of Attachment.

[TITLE.]

Whereas the above named plaintiff commenced an action in the District Court of the Judicial District of the State of, in and for the County of, against the above named defendant, claiming that there was due to said plaintiff from said defendant the sum of dollars, besides interest, and thereupon an attachment issued against the property of the said defendant, as security for the satisfaction of any judgment that might be recovered therein, and certain property and effects of the said defendant

have been attached and seized by the Sheriff of the
..... County of, under and by virtue of
the said writ.

And whereas the said defendant has appeared in the
said action, and has applied to the said Court, upon rea-
sonable notice to the said plaintiff, for an order to dis-
charge the same upon the execution of an undertaking
on behalf of the said defendant by at least two sureties,
residents and freeholders or householders in the said
..... County of, in accordance with the
provisions of Section 136 of the Act entitled "An Act
to Regulate Proceedings in Civil Cases in the Courts of
Justice of this State," passed April 29, 1851, as amended
by an Act of April 14, 1863, and of Section 137 of said
first named Act, as amended by an Act of February 6,
1864; and the said Court having fixed the sum for which
the undertaking shall be executed at the sum of
dollars.

Now, therefore, we, the undersigned, residents and
householders [*or* freeholders] in the said
County of, in consideration of the premises,
and in consideration of the release from attachment of
the property attached, as above mentioned, and the
discharge of said attachment, do hereby jointly and
severally undertake, in the said sum of dollars,
and promise that in case the said plaintiff recover judg-
ment in the said action, the said defendant will, on de-
mand, re-deliver such attached property so released to
the proper officer, to be applied to the payment of the
judgment, and that in default thereof the said defendant

and sureties will on demand pay to the said plaintiff the full value of the property released, not exceeding the said sum of dollars.

[DATE.]

[SIGNATURES AND SEALS.]

[*Justification.*]

No. 881.

Undertaking on Release of Attachment to be Given to Sheriff.

[TITLE.]

Whereas the above named plaintiff has commenced an action in the aforesaid Court, against the above named defendant, for the recovery of dollars.

And whereas an attachment has been issued, directed to the Sheriff of the County of, and placed in his hands for execution, whereby he is commanded to attach and safely keep all the property of the said defendant within his County not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand therein stated, in conformity with the complaint, at dollars, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said demand, besides costs, in which case to take such undertaking.

And whereas, the said defendant is desirous of giving the undertaking mentioned in the said writ.

Now, therefore, we, the undersigned, residents of the County of, in consideration of the premises, and to prevent the levy of said attachment, do hereby jointly and severally undertake, in the sum of

..... dollars, and promise to the effect that if the said plaintiff shall recover judgment in said action, we will pay to the said plaintiff, upon demand, the amount of said judgment, together with the costs, not exceeding in all the said sum of dollars.

[DATE.]

[SIGNATURES AND SEALS.]

80. Bond to be Given.—Whenever the defendant shall have appeared in the action, he may, upon reasonable notice, apply for an order to discharge the attachment in whole or in part, which order may be granted upon an execution of undertaking. (*Cal. Pr. Act*, § 136.) A common law bond in form, upon the prescribed statutory conditions, given to a sheriff to procure a discharge of goods attached, is a sufficient compliance with the provisions of the Statute. (*Curiac v. Packard*, 29 *Cal.* 194.) Whether each obligor is liable to the Sheriff for the whole amount of any judgment against him, leaving the question of contribution to be settled between them, *query*, (*White v. Fratt*, 13 *Cal.* 521.) An undertaking given to a sheriff to procure a release of goods attached is for the benefit of the plaintiff who may sue on it, and if the Sheriff takes a sufficient statutory undertaking, he has no further responsibility. (*Id.*) The undertaking only operated to release the property from the custody of the Sheriff pending the suit, and not as an actual substitution of security. *Low v. Adams*, 6 *Cal.* 277; *Curiac v. Packard*, 29 *Cal.* 194.

81. Penalty—Measure of Liability.—In a bond given to release property seized on an attachment, the obligors undertook to pay, costs, not to exceed three thousand dollars, which plaintiff might on demand, to plaintiffs in the action, the amount of the judgment and recover. In the bond the action is recited as for one thousand six hundred dollars. Upon delivery of the bond, the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the bond. *Held*, that recovery may be had on the bond to the extent of the penalty. (*Palmer v. Vance*, 13 *Cal.* 553.) Such a bond is not a statutory undertaking, but is valid as a common law obligation, and is a sufficient compliance with the Statute. The mistake in the recital, as to the amount for which attachment is issued, may be explained and corrected by parol. (*Id.*) Execution against the judg-

ment-debtor, in such case, is not a condition precedent to suit on the bond. (*Id.*) A bond given voluntarily to the Sheriff, on delivery of the property, is valid at common law. *Id.*

82. Right of Sureties.—If the defendant obtains an order for the release of the property attached, by delivering to the Court an undertaking executed by sureties, conditioned to pay the plaintiff any judgment he may recover, and the property is thereupon released, whenever the liability of the sureties is fixed by the rendition of the judgment in favor of the plaintiff, the sureties have a right to tender to the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking. *Hayes v. Josephi*, 26 *Cal.* 540; *Curiac v. Packard*, 29 *Id.* 194; *Norwood v. Kenfield*, 30 *Cal.* 393.

83. Suit on Bond.—Where defendant in attachment applies to the Court, under Sections one hundred and thirty-six and one hundred and thirty-seven of the Practice Act, for a discharge of the attachment, and an undertaking is executed by D. and R., reciting the fact of the attachment, and that "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the Court makes an order discharging the writ and releasing the property: *Held*, in suit against the sureties on the undertaking, that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release, in consequence and in consideration of the undertaking, by order of the Court, which is set out, the actual release and re-delivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. *McMillan v. Dana*, 18 *Cal.* 339; but see *Williamson v. Blatten*, 9 *Cal.* 500.

*No. 882.**Order Vacating Writ of Attachment.*

[TITLE.]

On the annexed notice of motion [and the affidavits of L. M. and N. O.], and on motion of G. H. for defendant:

It is ORDERED, that the attachment issued [*or granted*] against the property of the above-named C. D., on the day of, 18 . . , be discharged; and that any and all proceeds of sales and moneys by said Sheriff collected, and all the property attached remaining in his hands, be delivered and paid by him to the defendant or his agent, and released from the attachment.

[SIGNATURE.]

[DATE.]

84. When Writ shall be Discharged.—If, upon such application, it shall satisfactorily appear that the writ of attachment was improperly or irregularly issued, it shall be discharged. (*Cal. Pr. Act*, § 140.) An order improperly dissolving an attachment will be reversed. (*Reiss v. Brady*, 2 *Cal.* 132) If the complaint states no cause of action, and does not admit of amendment, the attachment should be dissolved. If the complaint can be made good by amendment, the plaintiff should be allowed to amend, pending the motion to dissolve the attachments. (*Hathaway v. Davis*, 33 *Cal.* 161.) If the defendant dies after the levy of an attachment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator. (*Meyers v. Mott*, 29 *Cal.* 359.) An attachment is dissolved by the death of the debtor, and the appearance of administrator. (*Pancost v. Corporation of Washington*, 5 *Cranch C. Ct.* 507.) An attachment will be dissolved if the debt for which it was procured was secured by a mortgage. (*Kinsey v. Wallace*, 36 *Cal.* 463.)

85. When Writ will not be Discharged.—An attachment issued

as a provisional remedy under the Code of Procedure cannot be dissolved as to a part of the property, merely upon giving security as to such part, under Sections 240 and 241 of the Code. An application for a discharge, upon the undertakings specified in those sections, must relate to the whole of the property levied on. (*Royal Ins. Co. v. Noble*, 5 *Abb. Pr. (N.S.)* 54.) An order improperly dissolving an attachment will be reversed. *Reiss v. Brady*, 2 *Cal.* 132.

JUDGMENT WHERE PROPERTY IS ATTACHED, HOW SATISFIED.

86. If judgment be recovered by the plaintiff, the Sheriff shall satisfy the same out of the property attached by him, which has not been delivered to the defendant or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for the purpose: *First*, By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment. *Second*, If any balance remain due, and an execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales shall be given, and the sales conducted as in other cases of sales on execution. (*Cal. Pr. Act*, § 132.) The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the Sheriff to sell it. *Low v. Henry*, 9 *Cal.* 538.

87. A lien on land acquired by an attachment cannot be rendered effectual for the purpose of impeaching a conveyance of the land made by the defendant in

the attachment, until judgment is obtained in the suit in which the attachment is issued. (*McMinn v. Whelan*, 27 *Cal.* 300.) An attachment lien upon the property can be enforced only by a sale of the attached property under execution. *Myers v. Mott*, 29 *Cal.* 359.

88. Plaintiff (a corporation) attached a quartz mill and ledge belonging to the corporation. Subsequently the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company August 14th, 1858, the property sold, and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858. Sale October following—W. the purchaser. Defendants here are in possession under sheriff's sale on the decree. Plaintiff claims title under his judgment and sale. *Held*, that he cannot recover; that he acquired no lien by the attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants claim, the latter have the better right. *Collins v. Montgomery*, 16 *Cal.* 398.

89. **Distribution.**—In all cases of attachment hereafter to be issued against any person or persons, or chartered company, or corporation, miners, mechanics, salesmen, servants, clerks and laborers, on giving notice of the claim or claims, and the amount thereof, duly certified and sworn to by the creditor or creditors making the claim, to the officer executing such writs, at any time before the actual sale of property levied on, such officers shall pay to such miners, mechanics, salesmen, servants, clerks or laborers, out of the proceeds of the sale, the amount each is justly and legally entitled to receive for services ren-

dered, within the forty days next preceding the levy of the writ of execution, attachment or other writ, not exceeding one hundred dollars of gold coin of the United States. *Stat. of Cal.* 1867-8, p. 213.

90. Judgment for Defendant.—If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the Sheriff, and all the property attached remaining in the Sheriff's hands, shall be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom. *Cal. Pr. Act*, § 136.

91. Paying Over Proceeds.—The application of an attaching creditor to compel the Sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving to the other attaching creditors, it is the duty of the Sheriff to do so, if he wishes the decision to bind them. (*Dixey v. Pollock*, 8 *Cal.* 570.) A Sheriff who receives an attachment, regular upon its face, cannot pay over the money obtained by him from the sale of property levied on by virtue of the writ, to a junior attaching creditor, because the complaint in the action in which the attachment was issued did not set forth a cause of action upon which an attachment could issue. *McComb v. Reed*, 28 *Cal.* 281.

92. Sale of Property. Whenever property has been taken by an officer under a writ of attachment, in pursuance of the provisions of said Act, and it shall be made to appear satisfactorily to the Court, or a judge thereof, or a county judge, that the interest of the parties to the action will be subserved by a sale thereof, the Court or Judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the Court, to abide the judgment in the action. Such order shall be made only upon notice to the adverse party or his attorney, in case such party have been personally served with a summons in the action. (*Cal. Pr. Act*, § 654.) But no order of court is necessary to authorize a sale by the officer of perishable property. *Low v. Henry*, 9 *Cal.* 55.

GARNISHMENT.

93. By the United States courts it has been held that a garnishment is a suit, and not a mere process

of execution, and hence jurisdiction must appear by the pleadings. (*Tunstall v. Worthington*, *Hempst.* 662.) The doctrine of garnishment, although partially regulated by statute, is not the less a common law proceeding, and therefore in proceedings against a garnishee, the parties are entitled to a jury trial. (*Cahoon v. Levy*, 5 *Cal.* 294.) The process of garnishment is a legal, not an equitable remedy, and only applies to cases where the legal, as distinguished from the equitable relation of debtor and creditor exists between the defendant and the garnishee. *Hasey v. God is with us Congregation*, 35 *Cal.* 378.

94. Notice, Effect of.—A plaintiff who has sued out an attachment and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposed of the property, has a right to waive his lien on the property, and bring suit for the value of the property against the garnishee. (*Roberts v. Landecker*, 9 *Cal.* 262.) A garnishment served upon the owner, in the suit against the head contractor, after the commencement of the building, and before notice served, must prevail over the lien of a sub-contractor. *Cahoon v. Levy*, 6 *Cal.* 295.

95. Who Liable.—All persons having in their possession, or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied. *Cal. Pr. Act*, § 127.

96. When Liable.—The liability of a garnishee dates from the service of the attachment and affidavit, and from the notice to appear. (*Johnson v. Carry*, 2 *Cal.* 33.) Where B. was garnisheed in a suit against C., the day before he accepted an order drawn by A. in favor of C., but failed to inform C. thereof, and C., for a valuable consideration, sold the order, as indorsed, to D., an innocent purchaser: *Held*, that B.

having made the order negotiable, and put the same in circulation, is estopped from setting up against it any antecedent matter, and is liable to D. for the full amount thereof. *Garwood v. Simpson*, 8 Cal. 101.

No. 883.

Affidavit to Examine Garnishee.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. That he is the plaintiff above named; that this action was commenced in this Court by the filing of the complaint, affidavit, and undertaking on attachment, and the issuance of the summons and writ of attachment thereon, and that said attachment is still in force.

II. Deponent further says, that he gave information in writing to the Sheriff of said County, that one C. D. had in his possession or under his control certain credits [*or other personal property*], belonging to the defendant, and said Sheriff on the day of, 18 ., served upon said C. D. a copy of said writ, and a notice that said credits [*or other personal property*] were attached in pursuance of said writ; that said C. D. thereupon replied [*state reply*].

III. But this deponent is informed and believes, notwithstanding said reply, that the said C. D. has in his possession or under his control credits [*or other personal property*] belonging to the defendant as aforesaid, and prays that the said C. D. may be required to attend before this Court, and be examined on oath respecting the same.

No. 884.

Order to Examine Garnishee.

[TITLE.]

The people of the State of California,

To greeting:

Whereas an attachment has been issued out of this Court, against the property of the defendants in the above entitled action, and is still in force; and whereas it has been alleged and made to appear that you have in your possession or under your control certain debts, moneys, effects, credits and other property owing to or belonging to said defendant:

You are therefore commanded to be and appear before me at, on the day of, 18.., at o'clock, then and there to be examined on oath concerning the same; and you are further commanded not to pay, transfer, return, or otherwise part with or dispose of any such debts, moneys, effects, credits or other property, until duly released according to law.

Given under my hand this day
of, 18...

[SIGNATURE.]

97. Appearance of Garnishee.—The provisions of the above section were intended for the security of the plaintiff, and not to confer a privilege upon the garnishee; and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step. *Roberts v. Landecker*, 9 Cal. 262.

98. Answer of Garnishee.—A garnishee has the right to

interpose an answer. (*Shorey v. Rennell*, 1 *Sprague*, 418.) And courts should allow a garnishee to amend his answer whenever it appears that he has committed a mistake or fallen into an error which could not reasonably have been avoided. *Smith v. Brown*, 5 *Cal.* 118.

99. Citation to Garnishee.—Persons owing debts to the defendant, or having in possession or under their control any credits or other personal property belonging to the defendant, may be required to attend before the Court or Judge, or a referee appointed by the Court or Judge, and be examined on oath respecting the same. *Cal. Pr. Act*, § 128.

100. Discharge.—And where a party is garnisheed to answer on a certain day, and appears, and the summoning party declines, or is not prepared to take his answer, and the term closes without any action on the garnishment, the summons is discontinued, and the party discharged from liability to answer. *Ogden v. Mills*, 3 *Cal.* 253.

101. Liability.—A garnishee can only be required to answer as to his liability to the debtor or defendant, at the time of the service of the garnishment. (*Norris v. Burgoyne*, 4 *Cal.* 409.) Unless the answer of a garnishee discloses liens having priority of claim upon the funds in his hands, judgment must be rendered for the amount he admits is due. *Cahoon v. Levy*, 4 *Cal.* 244.

102. Notice to Third Person.—For the requisites of the Sheriff's notice to third persons, of the attachment, see (*Kuhlman v. Orser*, 5 *Duer*, 242; *Wilson v. Duncan*, 11 *Abb. Pr.* 3.) If he certifies that he has no property, etc., the certificate may be impeached. *Hopkins v. Snow*, 4 *Abb. Pr.* 368; *Carroll v. Finley*, 26 *Barb.* 61.

103. Other Actions Pending.—A garnishee cannot plead the pendency of the attachment suit in abatement of an action subsequently brought against him by the debtor in the attachment. Nor can he safely pay his creditor, the debtor in the attachment, so long as proceedings by attachment are in force. The proper course is for the Court to order a suspension of the action against the garnishee by his creditor, until the attachment proceedings are disposed of. (*McFadden v. O'Donnell*, 18 *Cal.* 160; 22 *Cal.* 122; 12 *Cal.* 667.) The fact that the defendant in an action for the recovery of money has been garnisheed by a creditor of the plaintiff constitutes no defense to the action, and cannot be set up in the answer as a plea in bar. The remedy of

defendant in such case is by motion, based upon affidavit of the fact, for stay of proceedings until the action against the plaintiff or the attachment therein is disposed of. (*McKeon v. McDermott*, 22 *Cal.* 667; *Pierson v. McCahill*, 21 *Id.* 122.) In the suit of H. against C., A. as sheriff, under a writ of attachment regularly issued in said action, seized in the hands of S. personal property as the property of C. S. sued A., to recover said property, alleging ownership, and on the trial deraigned title through a sale to him from C., made prior to said seizure under attachment. A. in defense pleaded said attachment suit and proceedings, and that said sale was fraudulent and void as against H. On the trial A. introduced in evidence the complaint, summons, answer, affidavit and undertaking for attachment, and the writ of attachment in said suit of H. against C., but introduced no judgment therein or other evidence of the debt demanded in said complaint: *Held*, that the admission of said evidence under the objections of S. was proper, but that said attachment suit and proceedings were unavailable to A. as a defense to said action, in the absence of proof of a judgment therein of the existence of said debt. (*Sexey v. Adkinson*, 34 *Cal.* 346.) The transfer of said property by said sale from C. to S., even if fraudulent, was good as against all the world except creditors, and even a creditor at large could not attack it. (*Sexey v. Adkinson*, *Id.*) When property is taken from the possession of the defendant by the officer levying thereon, it is sufficient to introduce in evidence the attachment or execution under which the levy is made; but when found in the possession of a stranger claiming title to the property so seized, it is likewise necessary to show a judgment or prove the debt for which judgment is demanded in the attachment suit. *Sexey v. Adkinson*, 34 *Cal.* 346.

104. Proceedings against Garnishee.—An order requiring a garnishee to pay into the Court the amount for which judgment has been rendered against him may be considered as improper. (*Smith v. Brown*, 2 *Cal.* 118; *Brumagim v. Boucher*, 6 *Cal.* 16.) In proceedings against a garnishee, it is the duty of the Court simply to render judgment against the garnishee for the amount found due by him to the judgment-debtor. *Brumagim v. Boucher*, 6 *Cal.* 16.

105. Proceeds of Mining Claim.—The defendant, some time previous to the suit of the plaintiff against the R. S. Mining Co., sued the company and obtained judgment against it by default. The judgment was made to draw a certain rate of interest, without there

being any prayer for such relief in the complaint. It was also erroneous in certain other respects. On appeal to the Supreme Court, the judgment was modified by striking out certain clauses, and in certain other respects. There was no stay of proceedings in the Court below, and before the decision of the case by the Supreme Court the defendant had taken out an execution, and caused the mining claims of the R. S. Mining Company to be sold. At the sale the defendant bid the full sum for which his execution called, and became the purchaser. He paid the Sheriff no money except his fees on the execution, but gave him a receipt, as is usual in such cases, for a sum equal to the face of the execution, less the fees paid to the Sheriff. The R. S. Mining Company had ceased to work their mine prior to this sale. After the sale a contract was made between the defendant and the company, by which the latter agreed to work the mine during the time allowed for the redemption, and pay over the proceeds to the defendant, and the latter agreed to pay all the expenses of working, and to pay the company wages in any event, whether the mine should yield a profit or not. Under this contract the defendant received from the mine over and above expenses the sum of \$7,000 in gold dust. Plaintiff, as an attaching creditor of the R. S. Mining Company, brings suit against the defendant as garnishee. *Held*, that the case presented failed to make the defendant a debtor of the company within reach of plaintiff's attachment. *Johnson v. Lamping*, 34 *Cal.* 293.

106. Release.—Where a garnishee, in discharge of a rule, answers on oath, that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the Court without further delay, unless his answer is controverted by the affidavit of the plaintiff. *Ogden v. Mills*, 3 *Cal.* 253.

107. Trust Fund.—Where A., who carried on a printing office, was indebted to the hands of the office, and he placed in the hands of B. a certain amount of money, with directions to B. to pay the hands, which B. neglected to do, and where there was no evidence showing that the hands agreed to look to B. for their money, or that A. was indebted to the hands in an amount equal or approximate to the sum in B.'s hands, and the money was subsequently attached in the hands of B. at the suit of C. against A: *Held*, that the money was liable to the attachment. *Chandler v. Booth*, 11 *Cal.* 342.

CHAPTER III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. The Statute provides the remedy of claim and delivery of personal property, which is a substitute for the former action of replevin, and is, at least, commensurate with the action of detinue at common law. (*McLaughlin v. Piatti*, 27 *Cal.* 452.) The plaintiff may, at the time of issuing summons, or at any time before answer, claim the delivery of such property to him. *Cal. Pr. Act*, § 99; *N.Y. Code*, § 206.

2. At common law replevin did not lie unless there had been an unlawful taking from the possession of another. Hence, for an unlawful detention or conversion of goods deposited with a bailee, *detinue* or *trover*, and not *replevin*, was the proper action. (1 *Sch. & Lefr.* 320, 321, 324; 7 *John.* 149; *Meany v. Head*, 1 *Mas.* 319.) But the practice is regulated by the various States. In California, claim and delivery (replevin) lies where the plaintiff is owner of the property which is *wrongfully detained* by the defendant. (*Cal. Pr. Act*, § 100.) It has been held that replevin will not lie by one joint owner, but the objection can only be taken by a plea in abatement where he sues for the whole. If he sues for a moiety, the Court will abate the writ. (*D'Wolf v. Harris*, 4 *Mas.* 515.) This decision was not made under a statute similar to ours—*query?*

3. Possession by the plaintiff, and an actual wrongful taking by the defendant, are necessary to support the action of replevin. (*Dickson v. Mathers*, *Hempst.* 65; *McArthur v. Hogan*, *Id.* 286.) But the taking need not be by defendant; it lies against all persons in whose possession personal property, unlawfully taken, may be found, except officers of the law who have possession by virtue of legal process. (*Murphy v. Tindall*, *Hempst.* 10; compare *Williamson v. Ringgold*, 4 *Cranch C. Ct.* 39.) The archives of any department are not in the possession of the head of department, chief of bureau, or clerk under either for the time being, but in the possession of the United States. Hence, a party cannot, by writ of replevin against such head of department, or other public officer, take papers from the public archives on allegation of their being his private property. (6 *Opp. Att'y-Gen.* 7; *Brenk v. Hagner*, 5 *Cranch C. Ct.* 71.) As to California rule, see *Ante*, Note 2.

4. In actions of replevin, where delivery cannot be had, and only detention of property is complained of, the measure of damage in respect of the value of property detained is the value at the place of detention where the action was commenced. In such case the action bears a near resemblance to trover, in which the value of the property at the place of conversion is taken as the criterion. (*Hisler v. Carr*, 34 *Cal.* 641.) For the purpose of determining the value of the property at the place of detention, and where also delivery should have been made—evidence is admissible of its value at the place of market, the cost of transportation thither, and the usual expenses of sale. (*Hisler v. Carr*, 34 *Cal.* 641.) In replevin, evidence may be admitted of

the highest market value of the property, between the time of conversion and the trial. *Tully v. Harloe*, 35 *Cal.* 302.

No. 885.

Affidavit on Claim and Delivery of Personal Property.

[TITLE.]

State of California,)
City and County of) ss.

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above entitled action.

II. I am the owner of and am lawfully entitled to the possession of the following described personal property, to wit: [*describe property.*]

III. That the said property is in the possession of and is wrongfully detained by the defendant in the said action.

IV. That the alleged cause of the detention of the said property, according to my knowledge, information, and belief, is the following, to wit: [*or, if he knows cause of detention from personal knowledge, allege it.*]

V. That neither the said property, nor any part thereof, has been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against my property, and that the actual value of the said property is dollars.

[*Jurat.*]

[SIGNATURE.]

No. 886.

Another Form.

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, deposes and says as follows:

I. I am the owner of the following described property.

[*Or*, I. The following goods were stored with me by their owner for months, which storage is worth dollars; and they have been taken from me without my consent, and without payment of said storage; *or other facts, showing right to the possession, avoiding legal conclusions.*]

II. The said property is wrongfully detained by C.D., at

III. The alleged cause of such detention, according to my best knowledge, information and belief, is [*state it particularly*]. *Or*, I have no knowledge or information of any cause alleged for such detention.

IV. The said property has not been taken for a tax, assessment or fine, pursuant to any statute.

V. It has not been seized under any execution or attachment against my property [*or, if seized, show exemption*].

[*Or*, V. That it was seized under an execution, but was part of my household furniture, which amounted in the aggregate to the value of dollars, be-

sides the articles specified in the statutes as exempt; and I am a householder, supporting a family.]

VI. The said property is worth dollars.

A. B.

[*Jurat.*]

AFFIDAVIT AND ITS REQUISITES.

5. Our Statute prescribes as follows: Where a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing: *First*, That the plaintiff is the owner of the property claimed [*particularly describing it*], or is lawfully entitled to the possession thereof. *Second*, That the property is wrongfully detained by the defendant. *Third*, The alleged cause of the detention thereof, according to his best knowledge, information, and belief. *Fourth*, That the same has not been taken for a tax, assessment, or fine, pursuant to statute, or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure; and, *Fifth*, The actual value of the property. *Cal. Pr. Act*, § 100; *N.Y. Code*, § 207.

6. **Affidavit Essential.**—For the purpose of replevying goods which have been attached, the writ of attachment, coupled with proof of the debt, is inadmissible in proof, without introducing the affidavit and other requisites to the issuing of the writ. *Thornburgh v. Hand*, 7 *Cal.* 554.

*No. 887.**Allegation of Exemption from Execution.*

I am a music teacher by occupation, and the said piano is necessary to the carrying on of my business. [Or, I am a physician, and said horse and buggy is necessary to enable me to carry on the practice of my profession.]

7. Facts Stated.—It is proper that an affidavit, claiming that property taken is exempt from execution, should show such exemption by stating the facts which constitute the exemption. *Spalding v. Spalding*, 3 *How. Pr.* 297; *S.C.*, 1 *Code R.* 64; see *Roberts v. Willard*, *Id.* 100.

*No. 888.**Alleged Cause of Detention—Possession Obtained by Fraud.*

That the alleged cause of such detention, according to my best knowledge, information and belief, is as follows: That the defendant claims to have purchased the same from me, but said pretended purchase was procured by fraud on the part of said defendant, in representing himself to be solvent and worth dollars, when in fact he was insolvent, and wholly unable to pay his debts, and well knew the fact so to be, and made such representations of his solvency to me with intent to deceive and defraud me; and relying thereon, I parted with possession of said goods.

*No. 889.**Averment of Right of Possession.*

That I am lawfully entitled to the immediate possession of the property hereinafter mentioned, by virtue of an agreement between me and the above named C. D., of which the following is a copy: [*here set out the agreement, or in any other manner show title, by stating facts*]; and that I claim possession, as aforesaid, of the following property, to wit: [*describe property.*]

*No. 890.**Averment of Right of Possession as Pledgee.*

The goods hereinafter mentioned were delivered to me by the said defendant, as a security for the payment of dollars; and the said defendant, unknown to me, took away said property from my possession against my will, and now refuses to return the same, while the said sum of money is still due and unpaid, and the said goods and chattels are my only security therefor; and I am entitled to and claim immediate possession thereof. Said goods are described as follows: [*description of goods.*]

*No. 891.**Allegation of Right of Possession as Lessee.*

That I hired the goods hereinafter mentioned, of the said defendant, for the term of months, and paid him therefor the sum of dollars; and that said time has not yet expired, and the said de-

fendant unlawfully got possession of said goods, and now wrongfully detains them from my possession. Said goods are described as follows: [*description of goods.*]

8. **Note.**—The averment of wrongful detention in the words of the Statute seems to be sufficient. *Hoffm. Prov. R.* 113.

No. 892.

Requisition to Take Property Indorsed on the Affidavit.

State of California,
City and County of..... } ss.

To the Sheriff of the County of:

You are required to take from C. D. the property within described, and to deliver it to the plaintiff.

E. F.,

[DATE.]

Atty. for Plff.

No. 893.

Another Form.

The People of the State of California,

To the Sheriff or any Constable of the
County of: ..., greeting:

You are hereby ordered to take the within described property from the within named defendants, and deliver the same to the within named plaintiff, upon receiving a written undertaking, executed by two or more sufficient sureties approved by you, to the effect that they are bound in double the value of the said

property, as stated in the within affidavit, for the return of the said property to the said defendant, if return thereof be adjudged, and for the payment to the said defendant of such sum as may, for any cause, be recovered against the said plaintiff,

Witness my hand, this day of, 18...

[DATE.]

J. P.,

Justice of the Peace

9. Liability of Sheriff.—The Sheriff will, however, be liable to the owner, who has his legal remedy against any one for the taking, unless it be by virtue of legal process against him. *Rhodes v. Patterson*, 3 *Cal.* 469.

10. Requisition to Sheriff.—The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the Sheriff of the County where the property claimed may be to take the same from the defendant. *Cal. Pr. Act*, § 101.

No. 894.

Undertaking on Claim and Delivery of Personal Property.

[TITLE.]

WHEREAS it is alleged by the plaintiff in the above entitled action that the defendant in the said action has in his possession and unjustly detains certain personal property belonging to the said plaintiff, to the said possession of which the said plaintiff is lawfully entitled, of the value of dollars.

AND WHEREAS the said plaintiff, being desirous of having the said personal property delivered to, and by indorsement in writing upon the affidavit has required the Sheriff of the County of to take the said property from the said defendant.

NOW, THEREFORE, we, the undersigned, residents of the said County, in consideration of the premises, and of the delivery of said property to the said plaintiff, do hereby undertake and acknowledge to the effect that we are jointly and severally bound in the sum of dollars (being double the value of said property as stated in the affidavit), for the prosecution of the said action, for the return of the said property to the said defendant if return thereof be adjudged, and for the payment to the said defendant of such sum as may from any cause be recovered against the said plaintiff.

[SIGNATURES AND SEALS.]

[DATE.]

[Justification.]

11. Bond Sufficient.—A replevin bond was made to the Sheriff instead of the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond. (*Turner v. Billagrani*, 2 *Cal.* 522.) The City of San Francisco (*Statutes of California*, 1851, p. 350) and the State of California (*Statutes of California*, 1863-4, p. 261) need not give bonds.

12. Damages on Failure to Prosecute.—The opportunity to obtain a judgment for the return of property in an action upon a statutory undertaking having been taken away by the failure to prosecute, defendant is entitled to recover, in an action on the undertaking, compensation in damages. *Mills v. Gleason*, 21 *Cal.* 274.

13. Dismissal of Action before Trial.—Where the replevin action is dismissed before trial, the liability of the sureties on the undertaking for a return of the property is not affected by the fact that before the dismissal an answer had been filed in which no return of the property was claimed. (*Mills v. Gleason*, 21 *Cal.* 274.) The dismissal of a replevin action by the plaintiff before trial leaves the parties to settle in an action upon the undertaking those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first

instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover, in an action on the undertaking, compensation in damages. *Id.*

14. Duty of Sheriff.—Upon a receipt of the affidavit and notice, with a written undertaking, approved by the Sheriff, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the Sheriff shall forthwith take the property described in the affidavit, if it be in possession of the defendant or his agent, and retain it in his custody. *Cal. Pr. Act*, § 102; *N.Y. Code*, § 209.

15. Form.—For a form of undertaking, see (*Bowdoin v. Coleman*, 3 *Abb. Pr.* 431; S.C., 6 *Duer*, 182.) In some States only one surety is required, but in California the Statute requires two. *Cal. Pr. Act*, § 102.

16. Property Concealed.—If the property, or any part thereof, be concealed in a building or inclosure, the Sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county. *Cal. Pr. Act*, § 107; *N.Y. Code*, § 214.

17. Property, how Kept.—When the Sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same. *Cal. Pr. Act*, § 108; *N.Y. Code*, § 215.

18. Return of Sheriff.—The Sheriff shall file the notice, undertaking, and affidavit, with his proceedings thereon, with the Clerk of the Court in which the action is pending, within twenty days after taking the property mentioned therein. *Cal. Pr. Act*, § 110; *N.Y. Code*, § 217.

19. Service on Defendant.—The Sheriff shall, without delay, serve on the defendant a copy of the affidavit, notice and undertaking,

by delivering the same to him personally if he can be found, or to his agent, from whose possession the property is taken, or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest postoffice, directed to the defendant. *Cal. Pr. Act*, § 102; *N.Y. Code*, § 209.

No. 895.

Notice of Exception to Sufficiency of Sureties on Undertaking.

[TITLE.]

SIR: You will please take notice, that the defendant in the above entitled action does not accept the undertaking given on the part of the plaintiff in the said action, upon your taking the personal property claimed by him, but expressly excepts to the same, and to the sufficiency of the sureties thereto; and that such sureties, and each of them, are required to justify, as provided by law.

Dated this day of, 18...

A. B.,

Att'y for Def't.

To,

Sheriff of the County of

20. Exception by Defendant.—The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the Sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. (*Cal. Pr. Act*, § 103; *N.Y. Code*, 210.) If the defendant excepts to the sureties, he cannot reclaim the property. (*Id.*)

21. Justification of Sureties.—When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest; and the Sheriff shall be responsible for the sufficiency of the sureties

until the objection to them is either waived, as above provided, or until they justify. *Cal. Pr. Act*, § 103; *N.Y. Code*, § 210.

No. 896.

Notice to Sheriff to Return the Property.

[TITLE.]

To, Sheriff of County:

I hereby require that you return to me the personal property taken by you in this action [*describe property*].

E. F.,

[DATE.] .

Atty. for Deft.

No. 897.

Undertaking for a Return to Defendant on Claim and Delivery of Personal Property.

[TITLE.]

I. WHEREAS, Sheriff of the City and County of, State of, under and by virtue of an order and requirement duly made and issued in the above entitled action, and to him directed, did, on the day of, 18.., take from the possession of the defendant in the said action the following described personal property, to wit: [*describe property*.]

II. And whereas the said defendant is desirous that the said property be re-delivered to by the said Sheriff.

III. Now, therefore, we, the undersigned, in consideration of the premises, and of the said re-delivery of the said property from the said Sheriff to the said defendant, do undertake, promise, and acknowledge to the effect

that we are jointly and severally bound unto the said Sheriff, in the sum of dollars (being double the value of the said property, as stated in the affidavit of the plaintiff), for the delivery thereof to the said plaintiff, if such delivery be adjudged, and for the payment to of such sum as may for any cause be recovered against the said defendant.

Dated this day of, 18...

[SIGNATURES AND SEALS]

22. Return of Property.—If the defendant does not except to the sureties, he may require the return of the property upon giving a written undertaking executed by two or more sufficient sureties. But if a return of the property be not so required within five days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in Section one hundred and nine. *Cal. Pr. Act*, § 104; *N.Y. Code*, § 211.

No. 898.

Approval by Sheriff.

I approve the within undertaking, both as to form and to the sufficiency of the sureties thereof.

[DATE.]

G. H.,
Sheriff of County.

NOTE.—This is the usual form in New York, where the Sheriff must indorse his approval on the undertaking. *Burns v. Robbins*, 1 *Code R.* 62.

23. To Whom Given.—Section 104 of the *Cal. Pr. Act* contemplates an undertaking given to the Sheriff; but it may be given to the plaintiff, and not to the Sheriff. (*Slack v. Heath*, 4 *E. D. Smith*, 95; *S.C.*, 1 *Abb. Pr.* 331.) The bond is assignable by the Sheriff. *Wingate v. Brooks*, 3 *Cal.* 112.

24. Liabilities of Sureties.—In an action on a replevin bond, the defendant's liability is limited to the damages sustained by a failure to return the property. (*Hunt v. Robinson*, 11 *Cal.* 262.) The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. (*Nickerson v. Chatterton*, 7 *Cal.* 568.) The liability of the sureties cannot be more than the value of the property fixed by the judgment in the original suit. (*Nickerson v. Chatterton*, 7 *Cal.* 568.) In an action against the sureties on a replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given. (*Id.*; *Chambers v. Waters*, *Id.* 390.) It must be alleged that the defendant neither re-delivered the property, nor paid the value thereof, as recited in the judgment. *Nickerson v. Chatterton*, 7 *Cal.* 568; *Chambers v. Waters*, *Id.* 390.

No. 899.

Notice of Justification of Defendant's Sureties.

[TITLE.]

To E. F., plaintiff's attorney:

Take notice, that the sureties in the undertaking, of which a copy is annexed, will justify before the Hon., Judge of the District Court of the Judicial District, at chambers, in the Court House of the City of, on the day of, 18.., at o'clock in the noon.

G. H.,

[DATE.]

Atty. for Defl.

25. Justification of Defendant's Sureties.—The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, shall justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification, the Sheriff shall deliver the property to the defendant. (*Cal. Pr. Act*, § 105.) Where the defendant gives an undertaking to reclaim the property, an affidavit

by the sureties annexed is not required by law, and is unnecessary to the validity of the undertaking. It is only a precautionary measure on the part of the Sheriff. The right of the defendant to the delivery of the property to him is dependent on the justification upon notice. *Grant v. Booth*, 21 *How. Pr.* 354.

26. Qualifications.—The qualifications of sureties, and their justification shall be such as are prescribed by this Act, in respect to bail upon an order of arrest. *Cal. Pr. Act*, § 106; *N.Y. Code*, § 213.

27. Responsibility of Sheriff.—The Sheriff shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time. If they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff. *Cal. Pr. Act*, § 105; *N.Y. Code*, § 212.

No. 900.

Notice of Motion to Set Aside Proceedings.

[TITLE.]

To, plaintiff's attorney:

Take notice, that on [the annexed affidavit, and on the complaint and all the proceedings in this action], the undersigned will move the Court, at, on the day of, 18.., at o'clock A. M., or as soon thereafter as counsel can be heard, that the affidavit made by the plaintiff in this action, and the requisition to the Sheriff of the County of, indorsed thereon, and all proceedings taken by the plaintiff or by the said Sheriff, respectively, by virtue thereof, may be set aside as void [and irregular, for that, *etc.*, specifying irregularity complained of], and that the property taken by the said Sheriff under said affidavit and requi-

sition may be restored by him to the said defendant; and for such other or further relief as may be just [and for the costs of this motion].

[SIGNATURE.]

[DATE.]

NOTE.—This form is from Abbotts', and is the approved form according to the New York Practice.

28. Claim by Third Person.—If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to (the) possession thereof, stating the ground of such title or right, and serve the same upon the Sheriff, the Sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the Sheriff against such claim, by an undertaking. *Cal. Pr. Act*, § 109; *N. Y. Code*, § 216.

No. 901.

Affidavit of Claim by Third Person.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I am the sole owner and entitled to the possession of certain personal property taken by the Sheriff of the County of, in this action, which property is described as follows: [*description of property.*]

II. That on the day of, 18 . . ., I purchased the same from one M. N., of, and paid him dollars therefor, and I have not in any way sold or disposed of the same.

[SIGNATURE.]

[*Jurat.*]

29. Affidavit.—Such third person shall make and serve upon the Sheriff an affidavit showing his title to the property and his right to the possession. Such provisions are only applicable when the property is taken by the Sheriff, in the proper discharge of his duty, from the possession of the defendant or his agent. *King v. Orser*, 4 *Duer*, 431.

No. 902.

Notice to Sheriff to Accompany Affidavit.

[TITLE.]

To S. H., Sheriff of the County of:

Please take notice, that I claim the personal property mentioned in the affidavit herewith served, and require you to deliver the same to me.

[SIGNATURE.]

[DATE]

No. 903.

Notice to Plaintiff to Indemnify Sheriff.

[TITLE.]

To, plaintiff's attorney:

Please take notice that claims the property taken by me in this action, and that I require the plaintiff to indemnify me, or I shall not keep the property, nor deliver it to the plaintiff.

S. T.,

[DATE.]

Sheriff.

*No. 904.**Undertaking of Indemnity.*

[TITLE.]

Whereas the plaintiff has claimed the following property [*describing it*], and T. S., of, claims the same as his property.

Now, therefore, we, L. M., of, merchant, and N. O., of, banker, undertake, in the sum of dollars, to indemnify the Sheriff of the County of against the claim of the said T. S., in consideration that the said property be delivered to the plaintiff.

[SIGNATURES AND SEALS.] ,

[DATE.]

State of California
City and County of } ss.

L. M. and N. O., being duly sworn, severally say, each for himself, as follows:

I. I am a freeholder [*or* householder] of the said County of

II. I am worth dollars over all my debts and liabilities, and exclusive of property exempt from execution.

[SIGNATURE.]

[*Jurat.*]

30. Action on Bond.—If in a bond to indemnify a sheriff for replevying property claimed by a person other than defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the Sheriff cannot maintain

an action on the bond because a judgment has been recovered against him, but must first pay the judgment. *Lott v. Mitchell*, 32 *Cal.* 23.

31. Lien of Attachment.—T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as Sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking, as required by Section one hundred and two of the Code. The undertaking was executed by defendants R. and S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J. November 30th, 1854. On the 18th of February, 1855, execution in favor of other creditors of J. coming into the hands of H., as Sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into Court. H. then brought this suit against the sureties in the replevin bond. *Held*, that the lien of T.'s attachment continued after the replevy of the goods by M. J. (*Hunt v. Robinson*, 11 *Cal.* 262.) The possession obtained by the plaintiff in replevin is only temporary; it does not divest the title, or discharge the lien. (*Id.*) In an action upon a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. (*Id.*) When the same property came into the hands of H., as sheriff, the condition of the replevin bond to return the property was fulfilled. *Id.*

CHAPTER IV.

INJUNCTION.

1. Under our Statute, an injunction is defined to be a writ or order requiring a person to refrain from doing a particular act. (*Cal. Pr. Act*, § 111.) It may be observed that in order to obtain this writ the complaint or bill must show with clearness the act or acts which the defendant is doing, or the act or acts which he is about to do, and such acts must be those mentioned in Section one hundred and twelve of our Code. The provisions of this section will be found sufficiently general to meet nearly every case which can arise under the modern practice, and, therefore, it is the landmark by which we must be guided. In some respects it narrows the power of the Courts; yet it is broad enough to give ample relief where the wrong would otherwise be irreparable.

2. An injunction is purely a preventive remedy; if the injury be already done, the writ cannot correct the injury so inflicted; it is not a punishment for past wrongs, but a restraint against the commission of future injuries. This writ is intended to require all parties to leave things just as they were at the time of the issuance of it. It will stay waste, yet it will not change the possession of the property; it will protect a party against future injury, yet it will not settle the question of title or the rights of the parties. At common law,

an injunction is defined to be a prohibitory writ, specially prayed for by a bill in which the plaintiff's title is set forth, restraining a person from committing or doing an act (other than criminal acts) which appears to be against equity and conscience. If the subject of a bill in equity be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed, in the nature of an interdiction by the civil law, commanding the defendant to cease. *Hilliard on Injunctions*, pp. 1 and 2.

3. Mandatory injunctions, commanding an act to be done, are not granted under the provisional remedy of the Statute. (*Ware v. Kelsey*, 14 *Abb. Pr.* 105; *Akrill v. Selden*, 1 *Barb.* 316.) But they are proper as a part of the final relief. (*People v. Vanderbilt*, 25 *How. Pr.* 129.) The form of an injunction must always be in the negative. A party cannot be enjoined *to do* an act, but only from *doing it*. (*Cal. Pr. Act*, § 111; *Sanders v. Logan*, 9 *Am. Law Rep.* 475; S.C., 2 *Fish.* 167; *Attorney-General v. N. J. R.R. Co.*, 2 *Greene Ch. R.* 141; *Lane v. Newdigate*, 10 *Ves.* 193.) Nor, in general, should an injunction attempt to do indirectly that which it cannot do directly. *Akrill v. Selden*, 1 *Barb.* 317; *Blakemore v. Glamorgan Canal*, 1 *Mylne & Keen*, 183; disapproving *Lane v. Newdigate*, 10 *Ves.* 194; *Deere v. Guest*, 1 *Mylne & Cr.* 522.

4. The rule appears to be, that when defendant has actually taken an aggressive step clearly against law, and specially injurious to plaintiff, he may be compelled by injunction to retrace his steps, and an injunction *will lie* against the continuance of an act. *Greatrex v. Greatrex*, 1 *De G. & Sm.* 693; *Taylor v. Davis*, 3 *Beav.*

388; see *Whittaker v. Howe*, *Id.* 387, 395; *Evitt v. Price*, 1 *Sim.* 483; *Manchester Railway v. Workshop Board of Health*, 23 *Beav.* 209; *Great Northern Railway v. Clarence Railway*, 1 *Collyer*, 517, 521, 526; *Hervey v. Smith*, 1 *Kay. & J.* 389; *Mexborough v. Bower*, 7 *Beav.* 193; *Spencer v. Lond. and Bir. R.R.*, 8 *Sim.* 198; *Rankin v. Hukisson*, 4 *Sim.* 16.

BY WHOM GRANTED.

5. The grant of authority to the County Judge, to award injunctions in cases brought in the District Court, is a mere power to issue mesne process auxiliary to the proper jurisdiction of the District Court, and is not trenching upon it. (*Thompson v. Williams*, 6 *Cal.* 88.) The granting an injunction by a County Judge on a bill filed in the District Court is auxiliary to the action of that Court, and has the same force and effect, for all intents and purposes, as if it were the direct act of the latter. *Crandall v. Woods*, 6 *Cal.* 449; see *Ward v. Preston*, 23 *Cal.* 46; *People v. Wright*, 21 *Cal.* 151.

6. A County Judge, in granting an injunction upon a bill filed in the District Court, acts as an injunction master, and is exercising a power auxiliary to the jurisdiction of the District Court. The effect of such an order is the same as if made by the District Court, and the injunction is subject to be controlled, modified or dissolved by the District Judge, the same as if issued by his order in the first instance. (*Borland v. Thornton*, 12 *Cal.* 440.) A county judge has no power to grant an injunction in an action not triable within his county; and if he do, it is void, not voidable. (*Eddy v. Howlett*, 2 *Code Rep.* 76; *Chubbuck v. Morrison*, 6 *How. Pr.* 367.)

Consult "*Jurisdiction*," Vol. i., pp. 24, 27, 34, 38, as to who may grant injunctions.

WHEN INJUNCTION LIES.

The granting or dissolving an injunction rests in the sound discretion of the Court, and on the justice and equity of each particular case. (*Tucker v. Carpenter, Hempst.* 440; *Nelson v. Robinson, Id.* 464.) The plaintiff's *rights*, in order to be protected by injunction, must be such as can be enforced in the court to which he applies. (*Rogers v. Mich. So. R.R.*, 28 *Barb.* 541; see, also, *Reubens v. Joel*, 13 *N.Y.* 492; overruling 10 *How. Pr.* 225; *Malcolm v. Miller*, 6 *How. Pr.* 456; 25 *Barb.* 408; 3 *E. D. Smith*, 295; 7 *How. Pr.* 347; 5 *Id.* 438.) And injunction will not be granted where the acts complained of are already accomplished. 13 *N.Y.* 388; 2 *Duer*, 531; 6 *How. Pr.* 347, 348.

8. Our Statute gives three instances where the writ of injunction may issue, to wit: *First*, When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. (*Cal. Pr. Act*, § 112, Subd. 1.) *Second*, When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the plaintiff, an injunction may be granted. (*Cal. Pr. Act*, § 112, Subd. 2.) So, in aid of an action of trespass, unless it appear that the injury will be irreparable and cannot be compensated in damages, injunction will not be granted. (*Waldron v. Marsh*, 5 *Cal.* 119;

Erpstein *v.* Berg, 13 *How. Pr.* 92; 8 *Id.* 63.) But an action will lie to enjoin a threatened trespass on land, where the trespass, if committed, would destroy the substance of the land, which could not be specifically replaced. (Moore *v.* Massini, 32 *Cal.* 590; and authorities therein cited.) *Third*, When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction will be granted. (*Cal. Pr. Act*, § 112, Subd. 3; *N.Y. Code*, § 219.) But a careful reference to the decisions of our courts in cases arising under each of those subdivisions will be necessary to understand fully their meaning. The decisions of the highest Court of our own State, as well as those of many other States in the Union, have been exhaustive upon the points arising under this and similar statutes.

WHEN INJUNCTION WILL NOT BE GRANTED.

9. Injunctions are not granted except with great caution, and in cases where the right and necessity are clear; (1 *Bosw.* 22; Roberts *v.* Matthews, 18 *Abb. Pr.* 199;) and should not be granted in a matter merely pecuniary, where the probabilities are against the plaintiff's success upon the trial of the cause. (1 *Bosw.* 232; 5 *De Gex, M. & G.* 52; 11 *Abb. Pr.* 35.) It may be advantageous to give some instances where the writ of injunction will *not be granted*. *First*, one court cannot, by injunction, restrain the executions or orders of another court of equal and co-ordinate jurisdiction. (Revalk *v.* Kraemer, 8 *Cal.* 66; Phelan *v.* Smith, *Id.* 526; An-

thony *v.* Dunlap, 8 *Cal.* 27; Rickert *v.* Johnson, *Id.* 35; Chipman *v.* Hubbard, *Id.* 270; Gorman *v.* Tomy, 9 *Id.* 77; Uhlfelder *v.* Levy, *Id.* 614; Hockstacker *v.* Levy, 11 *Cal.* 76; Grant *v.* Quick, 5 *Sandf.* 612; Platto *v.* Deuster, 22 *Wis.* 482; Crowley *v.* Davis, *Cal. Sup. Ct., Apl. T.*, 1869.) This is clearly the rule in California, and, until recently, would seem to have been the rule everywhere. Some of the New York courts, in New York City, have deviated from this apparently well-settled principle of equity practice, as injunctions are now obtained in some of those courts in most instances where an action is brought. Whether this be the fault of the courts, the litigants, or attorneys, is a question which, doubtless, might require examination. But it is certain that the hasty and inconsiderate issuance of writs of injunction in doubtful cases is dangerous alike to the business interests of the country, the legal rights of parties, and the well-settled precedents of the courts. Nor can a state court enjoin the proceedings of a United States court. (Phelan *v.* Smith, 8 *Cal.* 520; see, also, McKee *v.* Voorhies, 7 *Cranch*, 281; 2 *Curt. C.S.* 629; Schuyler *v.* Pelliesier, 3 *Edw. Ch.* 193; Mead *v.* Merritt, 2 *Paige*, 404.) Nor has any United States court jurisdiction to enjoin proceedings in a state court. 4 *Cranch*, 180; 2 *Curt. C.S.* 63.

10. The general rule established by the decisions seems to be subject to *three* exceptions: *First*, Where the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions. (*Jur.* 223; 8 *Abb. Pr.* 241; 7 *Id.* 69; 17 *N.Y.* 608; 5 *Abb. Pr.* 410; 25 *Barb.* 531; 14 *N.Y.* 541.) But not where there are only two actions for the same cause. (McHenry *v.* Hazard, 45 *Barb.* 657.) A bill to restrain vexatious

litigation, upon the ground that the right to real property has been determined in former suits, must show that the title to the property was determined in a suit or suits in which all the claimants to the title were parties. (*Knowles v. Inches*, 12 *Cal.* 212.) *Second*, Where they lead in their execution to the commission of irreparable injury to the freehold. *Third*, Where the claim of the adverse party is valid upon the face of the instrument, or the proceeding sought to be set aside, and extrinsic facts are necessary to be proved, in order to establish the invalidity or illegality. In such cases equity will interpose. 14 *N.Y.* 541; and followed in 29 *Barb.* 40.

11. An injunction *will not be granted* when there is a remedy at law. A party who has his remedy provided by law, but does not avail himself thereof, and fails to show wherein he is injured, is not entitled to relief in a court of chancery. (*Merrill v. Gorham*, 6 *Cal.* 41; *Leach v. Day*, 27 *Cal.* 643; *Logan v. Hillegass*, 16 *Cal.* 200; *De Witt v. Hays*, 2 *Cal.* 463; *Ritchie v. Dorland*, 6 *Id.* 31; *Rogers v. City of Cincinnati*, 5 *McLean*, 337; held affirmatively in *Woolsey v. Dodge*, 6 *McLean*, 142; also *Segee v. Thomas*, 3 *Blatchf.* 11.) But it must be made to appear that the legal remedy would be adequate and complete. (*Hager v. Shinder*, 29 *Cal.* 47.) And a preliminary suit at law is not necessary where the mischief would be irremediable. (*Foot v. Linck*, 5 *McLean*, 616.) When its purpose can be as fully accomplished by any other proceeding, an injunction will not be granted. *Rogers v. Mich. So. R.R.*, 28 *Barb.* 541; *Mitchell v. Bettman*, 25 *Id.* 413.

12. In our courts the rules and principles of equity

practice remain unaltered, and the writ of injunction can only be issued where the case is one of equity jurisdiction. (*Minturn v. Hays*, 2 *Cal.* 590.) But injunction *will not be refused* merely because the plaintiff would, on the same showing, be entitled to an order of arrest. (*Merritt v. Thompson*, 3 *E. D. Smith* 294.) Where the question is doubtful, the burden of proof lies upon the party applying for an injunction to show that the argument, *ab inconveniente*, is in his favor. (*Child v. Douglas*, 5 *De Gex, M. & G.* 739; see *Coles v. Sims*, 5 *Id.* 9; *Bruce v. Del. etc. Canal Co.*, 19 *Barb.* 378; *Grey v. O and P. R.R Co.*, *Grant's Cases*, 412.) In all such cases the Court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Hicks v. Michael*, 15 *Cal.* 116.

13. An injunction will not be issued to protect a merely *nominal* interest. (*Wetman v. Story*, 3 *Abb Pr.* 281.) Nor should it be granted to restrain an injury which may be amply compensated by damages. (12 *How. Pr.* 221; 19 *Barb.* 378; 4 *How. Pr.* 177; *May. of N.Y. v. Shultz*, 31 *How. Pr.* 385.) Nor in cases of liquidated damages. See *Willard's Eq. Jur.* 274, 278; *Hoffm. Prov. Rem.* 215; 18 *How. Pr.* 534; 13 *Id.* 234; *Nessle v. Reese*, 19 *Abb. Pr.* 240; *S.C.*, 29 *How. Pr.* 382; *Vincent v. King*, 13 *How U.S.* 238; *Coles v. Sims*, 5 *De Gex, M. & G.* 9; *Giles v. Hart*, 5 *Jur. (N.S.)* 1,381; *Nicholls v. Stretton*, 7 *Bear.* 42.

14. An injunction cannot be allowed to prevent a *consequential injury*, resulting from the lawful exercise of a right. (*Williams v. N.Y. Central R.R.*, 18 *Barb.* 247; 16 *N.Y.* 163.) But an injunction is the proper

remedy to stay a threatened injury to right of way. (*Kittle v. Pfeiffer*, 22 *Cal.* 485.) Though mere apprehension of a threatened wrong is not enough. (*Mariposa Co. v. Garrison*, 26 *How. Pr.* 448; *Jenny v. Crase*, 1 *Cranch C. Ct.* 443.) Generally, on the subject of injunctions, see *Little v. Gould*, 2 *Blatchf.* 165, 184; *Linden v. Fritz*, 5 *Pr. Rep.* 188; *Howard v. Ellis*, *S. C. Rep.* 374; *Linden v. Hepburn*, 3 *Sandf. S. C. Rep.* 668; *Corning v. Troy Iron and Nail Factory*, 6 *Pr. Rep.* 92; *Tom & Daily v. Desha*, 4 *Ohio*, 547; *Steamboat Co. v. Livingston*, 3 *Cowen Rep.* 713; *Snowden v. Noah*, *Hopk. Rep.* 347; *Osborne v. Bank of U.S.*, 9 *Wheaton*, 738; consult, also, 6 *Paige Ch. Rep.* 83; 9 *Pr. Rep.* 102, 112; 7 *Ohio*, part 1, 217; 6 *Id.* 298; 6 *Paige Ch.* 262; 5 *Ohio*, 139; 2 *John. C.* 463; 5 *Ohio*, 178; 2 *Id.* 495; 8 *Ohio*, 38; 17 *Ohio*, 340; 6 *Ohio*, 166; 15 *Vermont*, 82; 9 *Wend.* 571; 19 *Barb.* 378; 16 *How. Pr.* 253; 1 *Bosw.* 232; 5 *Abb. Pr.* 218; 1 *Paige*, 98; 19 *Barb.* 371; 1 *Code Rep. (N.S.)* 207; 3 *Abb. Pr.* 182; 3 *Kern.* 492; 6 *How. Pr.* 341; 3 *Bosw.* 611; 10 *How. Pr.* 244.

INJUNCTION WHEN GRANTED.

15. The plaintiff is entitled to an injunction at the time of issuing the summons on the complaint alone, if it makes a proper case, and is verified in the manner stated in the 113th section of the Practice Act, and verification may be by the plaintiff, or some one in his behalf; but if he asks for an injunction at any time thereafter, he must do so upon affidavits. (*Falkenburg v. Lucy*, 35 *Cal.* 52.) The injunction may be granted at any time after issuance of summons, before judgment, upon affidavits. The complaint in the one

case, and the affidavits in the other, shall show satisfactorily that sufficient grounds exist therefor. *Cal. Pr. Act*, § 113.

16. When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint in advance of the filing to the Judge, and obtain the order or the allowance of the writ; and such practice is regular, and not in conflict with our Statute. (*Heyman v. Landers*, 12 *Cal.* 107.) In such case the order does not take effect until the filing of the complaint and the undertaking required. (*Id.*) When the equities of a complaint are fully denied by affidavits on the part of defendant, an application for an injunction *pendente lite* should be denied. *Gagliardo v. Crippen*, 22 *Cal.* 362.

No. 905.

Affidavit in Support of Complaint.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the attorney in fact of the said A. B. plaintiff in this action, for the purpose of suing for and recovering the [sum of money] mentioned in the complaint, by virtue of a power of attorney under seal, for that purpose duly executed and delivered.

II. The said A. B. is now absent from the City of, and now as I verily believe a resident of, in the Republic of Mexico, he having left

the City of, for, on or about the
 day of, 18...

III. I have read the complaint filed in this action, and know the contents thereof, and I have information as to all the matters stated therein [*give sources of information*], and from such information I believe such matters to be therein truly stated and such complaint to be true.

[SIGNATURE.]

[*Jurat.*]

17. Parties.—In whose favor an injunction may issue, consult *Thursby v. Mills*, 1 *Code Rep.* 83; *Footte v. N.Y. Silk Co.*, *N.Y. Trans.*, Dec. 23, 1859; *Edgumbe v. Carpenter*, 1 *Bear.* 173; *Waller v. Harris*, 7 *Paige*, 173.

18. Practice.—Upon an application for an injunction, affidavits may be read on the part of the plaintiff, in support of the bill, and in contradiction of the answer. (*Brook v. Bicknell*, 3 *McLean*, 250; S.C., 1 *West. Law J.* 150.) The admission of affidavits is in the discretion of the Court. (*Childs v. Fox*, 18 *Abb. Pr.* 112.) This practice enables the Judge to act upon the motion with a better knowledge of the equitable rights of the parties. (*Wilson v. Stolley*, 4 *McLean*, 272; S.C., 4 *West. Law J.* 371; 10 *Law Rep.* 81.) On a motion for an injunction; the plaintiff must rest on the case stated in the bill, though he may, by affidavits, state with more particularity any matters which it sets forth, and refer to collateral matters which explain, or which tend to support and strengthen it; he may also, in the same way, contradict any statements made by the defendant in his affidavit, and either party may take and read the affidavits of other persons. 19 *Ves.* 621; *Cooper v. Matthews*, 8 *Law Rep.* 413.

*No. 906.**Affidavit in Support of Complaint by Agent or Clerk of Defendant.*

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, says as follows:

I. I am familiar with all the material matters stated in the complaint in this action on the information and belief of the plaintiff, and have actual knowledge thereof; and from such knowledge I know that the matters of fact therein stated are true.

II. Until within a few days last past, I was in the employ of said defendant as book-keeper, and had free access to the books of said co-partnership and of said defendant, and had and have personal knowledge of the financial and other business matters of the said concern, and of said defendant.

[SIGNATURE.]

[*Furat.*]*No. 907.**Undertaking on Injunction.*

[TITLE.]

Whereas the above named plaintiff has commenced or is about to commence an action in the District Court of the Judicial District of the State of California, in and for the County of, against the above named defendant, and is about to apply for an injunction in said action against the said defendant, enjoining and restraining him from the commission of certain acts, as in the [affidavit] filed in the said action is more particularly set forth and described:

Now therefore, we, the undersigned, residents of the
 County of, in consideration of the
 premises and of the issuing of said injunction, do jointly
 and severally undertake in the sum of dollars,
 and promise to the effect, that in case said injunction
 shall issue the said plaintiff will pay to the said party
 enjoined such damages, not exceeding the sum of
 dollars, as such party may sustain by reason
 of the said injunction, if the said District Court finally
 decide that the said plaintiff was not entitled thereto.

[DATE.]

[SIGNATURES AND SEALS.]

State of California,
 City and County of } ss.

L. M. and N. O., the sureties whose names are sub-
 scribed to the above undertaking, being severally duly
 sworn, each for himself says:

I am worth the sum in the said undertaking specified,
 as the penalty thereof, over and above all my just debts
 and liabilities, exclusive of property exempt from exe-
 cution.

[SIGNATURES.]

[*Jurat.*]

19. Must be Given.—Except where the people of the State
 are a party plaintiff, this undertaking is required. (*Stat. of Cal.* p. 350.)
 The State and State Officers are also exempted. (*Stat. of Cal.* 1863-4,
 p. 261.) An injunction order is inoperative until the undertaking re-
 quired by the Statute be given. (*Elliot v. Osborne*, 1 *Cal.* 396.) But
 in New York it is not essential that the plaintiff should join in the un-
 dertaking. *Leffingwell v. Chave*, 10 *Abb. Pr.* 472; *S.C.*, 5 *Bosw.* 703.

20. Effect of Filing Undertaking.—A party filing an under-
 taking to obtain an injunction is deemed to have waived the right to
 insist on a trial by jury, and consented that the damages may be ascer-
 tained in the mode prescribed by the Statute; and an order of reference

is no violation of the constitutional right to trial by jury. (*Russell v. Elliot*, 2 *Cal.* 245.) The Court may order a reference to ascertain the damages. *St. Peter's Church v. Varian*, 28 *Barb.* 644; *Higgins v. Allen*, 6 *How. Pr.* 30.

21. Form of Bond.—That the proper form of an injunction bond is to answer all damages which the defendant may sustain in consequence of the injunction being granted, see *Bein v. Heith*, 12 *How. U.S.* 168.

22. Duty of Clerk.—In an action against the clerk of a court, on his official bond, the breach assigned being that he took an insufficient injunction bond: *Held*, that it was a good defense, that the plaintiffs obtained possession of the injunction bond, brought suit on it, and received a sum of money in satisfaction thereof. *Bevins v. Ramsey*, 15 *How. U.S.* 179.

INJUNCTION AFTER ANSWER.

23. An injunction shall not be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the Court or Judge granting or refusing the injunction. (*Cal. Pr. Act*, § 114; *N.Y. Code*, § 221.) But when the answer to a bill for an injunction denies all the equity of a bill, a preliminary injunction should not be granted. *Crandall v. Woods*, 6 *Cal.* 449.

No. 908.

Notice of Motion for Injunction.

[TITLE.]

To, defendant's attorney:

Please take notice that on the complaint in this action the undersigned will move the Court, at the City

Hall, at, on the day of, 18 . . ., at o'clock A.M., or as soon thereafter as counsel can be heard, for an order to show cause why an injunction order should not issue to restrain the defendant, his agents and servants, from [*state for what the injunction is required*], and for such other or further order as may be just.

[SIGNATURE.]

[DATE.]

23. Notice to be Given.—Notice of an application by plaintiff for an injunction must be given for the length of time prescribed by Section 517 of the Practice Act, that is to say, five days before the time appointed for the hearing, if the Court be held in the same district, otherwise ten days, unless the Court prescribe a shorter time. If given for a shorter time, and the defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve the same under Section 118. (*Johnson v. Wide West M. Co.*, 22 *Cal.* 479.) An application for an injunction should contain a description of the property sought to be protected by the decree, together with appropriate allegations of the danger or loss impending. *Blackburn v. Stannard*, 5 *Law Rep.* 250.

STATEMENTS IN MOTION.

I. ON CONTRACTS AND COVENANTS.

No. 909.

Against Violation of Covenant to Build.

From erecting upon [*describe the land*] any brewery or slaughter house.

NOTE.—For another form, see Mann & Stephens, 15 *Lim.* 38 *Eng. Ch.* 377.

24. Joint Interest.—Where the joint interest of the parties to a contract in its subject matter has not commenced, the Court will not, on the allegation of one party that he is injured by the acts of the

others, interfere by injunction against the latter. *Sloo v. Law*, 1 *Blatchf.* 512; S.C., *West. Law J.* 310.

25. Service.—As a general rule, an injunction restraining a party from giving his services cannot be granted. (*Fredericks v. Mayer*, 13 *How. Pr.* 571.) But a distinguished vocalist was enjoined from singing in a certain theatre in violation of her contract with the management of another. 1 *De Gex, M. & G.* 604; 13 *Eng. Law and Equity*, 252; overruling *Kimble v. Kean*, 6 *Sim.* 333; but see, *contra*, *Sanquirico v. Benedetti*, 1 *Barb.* 315; *Hamblin v. Dinneford*, 2 *Edw. Ch.* 529; and see 13 *How. Pr.* 571.

26. Specific Breaches.—In an action to enjoin for breach of covenant, the injunction will only be extended to breaches as to which the plaintiffs show that they require protection. General words prohibiting any act and breach of the covenants should not be inserted; for the Court does not without necessity presume there will be a violation of the covenants. (*Earl of Mexborough v. Bower*, 7 *Beav.* 127.) Where the breaches of an agreement are numerous, and from the nature of the case the plaintiff would be able to give evidence of but few of them, he may be allowed an injunction. (*Niagara Falls Intern. Bridge Co. v. Great West. Railroad Co.*, 39 *Barb.* 212.) Thus, a covenant to stop all trains at a certain station will be enforced by injunction. (*Linsey v. Gt. N. R.R. Co.*, 19 *Eng. L. & Eq.* 87; 10 *Hare*, 664.) But an injunction will not be granted to enforce or protect an illegal contract. *Bennett v. Am. Art Union*, 5 *Sand.* 631; *Mott v. United States Trust Co.*, 19 *Barb.* 568.

No. 910.

Against Resuming Practice after Having Sold Business.

From practising as an attorney or solicitor in any part of, either in his own name or in the name of any other person; and from endeavoring to induce any persons who were the clients of A. & B. to cease or abstain from employing B. & C. as their attorneys or solicitors, and to cease the practice of the law in any manner in the said Town of

27. Covenants of Trade.—And if a party covenants that he will not carry on his trade within a certain distance, or in a certain place, within which the other party carries on the same trade, a court of equity will restrain the party from breaking the agreement so made. (2 *Story's Eq. Juris.* § 722, a; 5 *Jur. (N.S.)* 1,381; 3 *Beav.* 394; 1 *Johns. Eng.* 446.) But this is allowed because of the utter uncertainty of any calculation of damages." (2 *Story's Eq. Juris.* § 722, a.) So if the contract names a penalty, injunction cannot be granted, but the party aggrieved must sue for the penalty, even if defendant be insolvent. (*Vincent v. King*, 13 *How. Pr.* 238.) Not so in England. See *Giles v. Hart*, 5 *Jur. (N.S.)* 1,381; *Nichols v. Stretton*, 7 *Beav.* 42.

28. Covenants of Trade.—A contract not to engage or practice in a business is violated by acting as an *employee* in such business, and such violation will be enjoined. (*Vincent v. King*, 13 *How. Pr.* 238; *Rolle v. Rolfe*, 15 *Sim.* 90.) Contracts in restraint of trade were regarded with great disfavor by the common law. (See *Parsons on Contracts*, Vol. ii., p. 254, n.) But the doctrine as generally held is limited to this: That a covenant not to exercise a trade, etc., *anywhere*, is void, but a covenant against the same, limited to a reasonable extent of district, within which competition would be possible, is valid. (2 *Pars. on Cont.* 254.) A distinction has been drawn between a *trade* and a *profession*; (*Whittaker v. Howe*, 3 *Beaver*, 394;) and in this case a covenant not to practice law in Great Britain was held valid, though not without some hesitation. A covenant against violation of the law and policy of the State, for example, the Sunday law, should be peculiarly favored. 2 *Bosw.* 578.

No. 911.

Against Carrying on Business Forbidden by Lease.

From carrying on the hardware business, or selling hardware in the store No. . . . , Street, in the City of; and from conducting therein any business other than [*state what*].

29. Inconsistent Reliefs.—A landlord cannot demand an injunction against a breach of covenant, in the same action in which he

demands a forfeiture of the lease. Such reliefs are inconsistent. (*Linden v. Hepburn*, 3 *Sandf.* 668; S.C., 5 *How. Pr.* 188; 9 *N.Y. Leg. Obs.* 80.) In chancery, a bill for injunction in such case must waive forfeiture and penalty. 3 *Atk.* 457.

30. Injunction Lies.—For violation of the covenant in a lease not to use the demised premises for certain purposes, injunction lies. (*Doop v. Lambert*, 2 *Bosw.* 570; *Howard v. Ellis*, 4 *Sand.* 369.) And so, even if it is a mere matter of taste. (*Steward v. Winters*, 4 *Sand. Ch.* 590.) But a covenant to carry on a particular business cannot be enforced by injunction. (*Hooper v. Brodrick*, 11 *Sim.* 49.) But the tenant may be restrained from doing or permitting anything to be done, which will prevent the premises from being used for such purposes. (*Id.*) A covenant or agreement, restricting the use of any lands or tenements, in favor of other lands, creates an easement, without regard to any priority or connection of title or estate in the two parcels or their owners. 2 *Phill.* 774; 23 *E.L. & E.* 384; 9 *Sim.* 196; 10 *Id.* 35; 15 *Id.* 377; 23 *Barb.* 153; 8 *Paige*, 351; *Gibert v. Peteler*, 38 *Barb.* 488.

No. 912.

Against Removing Fixtures.

From removing or causing to be removed from the premises hereinafter described any out-house, shed, building or addition, timber, building materials, or fixtures of any kind or character. Said premises are known as, at, and described as follows: [*description.*]

31. Misuse of Premises.—Tenant will be restrained from pulling down a house leased to him, and building another on its site, against the will of his landlord, without regard to the question whether such change would be an improvement or an injury to the premises. 18 *Bear.* 78.

32. Removal of Building.—An injunction will not be granted to a landlord to restrain tenants from removing a house, upon the

ground that the security for the suit will be impaired by the removal, even though there is an express covenant in the lease that the buildings on the land shall stand as security for the rent, unless it appears that by the removal of the building the security will be left inadequate. *Perine v. Marsden*, 34 *Cal.* 14.

33. Removal of Crop.—Where the petition set forth a lease and contract to pay in kind, a refusal to pay rent, and an allegation of removing the crop with intent to defraud the plaintiff of his rent, and a prayer for injunction: *Held*, that the injunction could not issue, unless plaintiff averred the insolvency of defendant, and an inability to make the rent on attachment or execution. *Gregory v. Hay*, 3 *Cal.* 334.

No. 913.

Against Under-Letting.

From granting or making, or contracting to grant or make, any lease, under-lease, or assignment of any part of the premises [*designating them*] demised by E. F. to G. H., by a lease dated on the day of, 18.., and from granting or conveying the same in any manner or form, or by any means.

II. CORPORATIONS ENJOINED.

No. 914.

Against Transfer of Stock.

From selling or transferring or issuing other stock therefor to one "A. B.," or to any other person, shares of the capital stock of the Company, which is standing on the books of the said Company, in the name of; and the said company in like manner, to be restrained from permitting or making any sale, by public auction or otherwise, of said stock, or

any part thereof, or from transferring the same on the books of said company, in any manner or by any means or at all.

34. Corporations Municipal.—Where the Board of Supervisors of San Joaquin County, under the Act of 1860, p. 317, authorizing them to levy a special tax for the construction and repair of seven public highways leading from the City of Stockton, the fourth of which was “a road running from the limits of Stockton *via* Hamilton’s ranch, known as the Sonora road,” levied and collected the tax, and then, July 10th, 1860, passed an order locating the route of this fourth road, along which plaintiffs lived, and afterwards assessed the damages to the owners of land, etc., but before they had obtained the right of way for this road passed another order in March, 1861, annulling the first order and changing the location of the road, which rendered the lands of plaintiffs of less value: *Held*, that the first order of laying out the road was unexecuted; that no rights of plaintiffs had vested, and that the Board had power to make the second order; that the first order was not in the nature of a power exercised and exhausted, but was at most a proposed mode of executing a power, which could be changed at any time before rights had vested under it. *Burkett v. Supervisors of San Joaquin*, 18 *Cal.* 702.

35. Corporation Suspended.—An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the Court or a judge thereof; nor shall it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this State are a party to the proceedings. (*Cal. Pr. Act*, § 117; *N.Y. Code*, § 224.) A court of equity has no jurisdiction over corporations, for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation. (*Neall v. Hill*, 16 *Cal.* 145; consult 14 *N.Y.* 506; 9 *N.Y.* 263; 10 *Abb. Pr.* 144; 5 *Id.* 47; 15 *How. Pr.* 428; 10 *How. Pr.* 476; 9 *Abb. Pr.* 254; 10 *Id.* 145; 7 *Id.* 179; 19 *Eng. L. & Eq.* 307.) As to restraining the payment of dividends, see 5 *Abb. Pr.* 279; 1 *Macn. & Gor.* 689.

36. Ferry Right.—A ferry owner, prevented from obtaining a

renewal of his license either by the incompetency or refusal of the supervisors to act in the premises, has a right to an injunction to restrain another party from running a ferry under an illegal license granted by the County Judge, within a mile of the first established ferry. *Chard v. Stone*, 7 *Cal.* 117.

37. Foreign Corporations.—The courts of this State will not grant injunctions to suspend the corporated franchises of a foreign corporation. (*Way v. Keyport Steamboat Co.*, 16 *Abb. Pr.* 320.) Nor will they, upon motion for a preliminary injunction, decide a question involving a forfeiture of corporate rights, unless it appear from the papers that serious injury will follow the refusal. (*People v. Harlem Bridge Co.*, 1 *Abb. Pr. (N.S.)* 169.) But directors may be restrained from committing fraudulent acts charged. *Howe v. Deuel*, 43 *Barb.* 505.

38. Laying out Road.—An order of a Board of Supervisors, laying out a road which is unconstitutional and null and void upon its face, does not effect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law. *Leach v. Day*, 27 *Cal.* 643.

39. Railroad Company.—Where a railroad company is authorized to construct a road and to take private property, upon the performance of certain conditions precedent, their entry for such purposes is a proper subject for an injunction, if the condition is not performed. (*Bonaparte v. Camden and Amboy R.R. Co.*, *Baldw.* 205.) Injunction was granted to prevent a change of the gauge of a railroad. *Colunbus etc. R.R. Co. v. Indianapolis etc. R.R. Co.*, 5 *McLean*, 450.

40. Stock, Sale not Enjoined.—The trustees of a mining corporation will not be enjoined from selling stock for unpaid assessments, in cases where the assessment is levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law. *Sullivan v. Triunfo G. and S. M. Co.*, 29 *Cal.* 585.

III. IN CREDITORS' SUITS.

*No. 915.**Against Selling and Conveying Property.*

From selling or conveying, by deed or otherwise, the following described property [*describe it*], or selling, conveying, or otherwise transferring or incumbering any real or personal property held by you in trust or otherwise acquired, received or obtained from, by or through [*state how, or through whom, showing trust property or otherwise*].

41. Collecting Money.—Under the ordinary injunction in a creditor's suit, it is a contempt to collect money earned before service of the injunction, and apply it to debts contracted for family supplies. *Taggard v. Talcott*, 2 *Edw.* 628.

42. Execution.—A court of equity will take jurisdiction of a bill for an injunction, filed by attaching creditors of an insolvent, to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted. (*Heyneman v. Dannenberg*, 6 *Cal.* 376.) It would be requiring the creditors to do a vain act to compel them to await their judgment at law and a return of execution, when it is admitted that the only effect would be a return of *nulla bona*, and the property attached would, in the mean time, have passed to innocent purchasers on execution sale under the judgment. *Id.*

43. Executors and Administrators.—An injunction may be granted at the instance of parties claiming to be preferred creditors of an estate, to prevent an executor or administrator from making distribution of assets, or removing them beyond the jurisdiction of the Court. *Green v. Hanberry*, 2 *Brock. Marsh.* 403; compare *Wilson v. Barstable*, 1 *Cranch C. Cl.* 394.

44. Form.—For another form, see *Knott v. Morgan*, 2 *Keen*, 213.

45. May Proceed to Judgment.—It seems that the debtor would not be prevented by it from proceeding to judgment, in a suit commenced before the injunction. (*Parker v. Wakeman*, 10 *Paige*, 485.) Nor is his act, in suing for a trespass, of itself a breach of the injunction. *Hudson v. Plets*, 11 *Id.* 180.

46. Novation.—Merely carrying into effect, by procuring novation, a previous assignment of a right of action, is not a breach of the injunction in a creditor's suit. *Richardson v. Rust*, 9 *Paige*, 243; to similar effect is *Ireland v. Smith*, 3 *How. Pr.* 244.

47. Sale of Property.—The right of a party to enjoin a sale of his property for another's debt is not denied, and is supported by several decisions of the Supreme Court. *Hickman v. O'Neal*, 10 *Cal.* 294; *Ford v. Rigby*, *Id.* 449.

No. 916.

Against Transferring Assets.

From selling, assigning, transferring, pledging, or otherwise disposing of any of his property, except what is by law exempt from execution; or from in any manner interfering therewith until the further order of the Court.

48. Fraudulent Disposition of Property.—An injunction may be granted, restraining fraudulent disposition of property. *Reubens v. Joel*, 13 *N.Y.* 488; approving *Perkins v. Warren*, 6 *How. Pr.* 347; *Malcom v. Miller*, 6 *Id.* 456; *Pomeroy v. Hindmarsh*, 5 *Id.* 438; *Dickinson v. Benham*, 10 *Abb. Pr.* 391; *Wilson v. Britton*, 6 *Abb. Pr.* 97.) But an injunction granted for this purpose cannot restrain the defendant from disposing of his property in a proper manner, but only from doing so with intent to defraud his creditors. (*Brewster v. Hodges*, 1 *Duer*, 610.) And an injunction was modified (see 25 *Barb.* 408) by inserting the words "with intent to defraud, etc.," but *query*, whether this is not, as far as moveables are concerned, a mere *brutum fulmen*. As to transfer of property generally, see (*Reubens v. Joel*, 13 *N.Y.* 488, 492; overruling *Motts v. Dunn*, 10 *How. Pr.* 225; see *Moran*

v. Dawes, Hopk. 365.) Of specific personal property, (*Erpstein v. Berg, 13 How. Pr. 92; Furniss v. Brown, 8 Id. 63; but see 28 Barb. 542.*) As to transfer of stock, *People v. Parker Vein Co., 10 How. Pr. 187; affirmed, Id. 584.*

49. Offer to Sell.—An offer to sell goods is not a violation of an injunction against the sale or parting with the control of them, but it may be good cause for appointing a receiver. *Tyler v. Pope, 4 Edw. 430.*

No. 917.

Against Transferring Negotiable Paper.

From indorsing, assigning, or in any way transferring [*describe note or bill*] a promissory note drawn by A. B. in favor of the above named C. D., for dollars in gold coin, bearing date the day of, 18.., and payable months after said date, and accepted by the said C. D.

50. Negotiable Securities.—If an action for an equitable set-off is maintainable, an injunction lies to prevent one party who holds a negotiable note from disposing of it. (*Scieffelin v. Hawkins, 1 Daly, 289; Osborne v. Bank of United States, 9 Wheat. 738.*) As to the transfer of bonds, notes, etc., see *State of Illinois v. Delafield, 8 Paige, 527; 2 Hill, 177; approved in 16 N.Y. 137.*

IV. IN LEGAL PROCEEDINGS

No. 918.

To Restrain Proceedings at Law—On Contract.

To restrain the defendant from proceeding further in his action at law against the above named, upon the bond of the said A. B., dated the day of, 18.., and from instituting or proceeding in

any new or other action at law upon such bond; and from commencing any action or actions against the plaintiff for the recovery of [*designating the alleged debt*].

51. Bringing Suit.—An order of injunction, whereby the bringing of an action is restrained, will be reversed, notwithstanding an injunction bond has been given. (*King v. Hall*, 5 *Cal.* 82.) The prosecution of a suit at law against the heirs is not a violation of an injunction restraining the creditor from bringing suit against the executors for the debt. (*Dale v. Roosevelt*, 1 *Paige*, 35.) The common order for an injunction in an interpleading suit is irregular, if it does not make the issuing of the injunction dependent on the payment of the money into court. (*Pauli v. Von Melle*, 8 *Sim.* (8 *Eng. Ch.*) 327.) Particular cases in which injunctions to restrain the prosecution of actions have been granted or refused: *Widorff v. Smith*, 16 *Pet.* 132; *Gaines v. Nicholson*, 9 *How. U.S.* 356; *Towne v. Smith*, 1 *Woodb. & M.* 115; *S.C.*, 9 *Law Rep.* 12; *Tremont v. Merced Mining Co.*, 1 *McAll.* 267; *Mullers v. Hamilton*, 2 *Hayn.* 346; *Fisher v. Lord*, 6 *West. Law J.* 137.

52. Enjoining Counsel.—In an action brought to restrain proceedings at law, it is improper to enjoin the counsel employed in those proceedings, unless something more is alleged against him than the prosecution of his client's rights. *Lord Wellington v. Earl of Mornington*, 11 *Beav.* 180; *Davis v. Mayor of New York*, 1 *Duer*, 451.

53. Form.—This form is from Abbotts' Forms, No. 1,446.

54. When Injunction Lies.—An injunction operates to restrain not only the party enjoined, but other courts on the ground of judicial comity. (*Engels v. Lubeck*, 4 *Cal.* 31.) An injunction cannot be granted affecting the rights and interests of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued. (*Patterson v. Yuba County*, 12 *Cal.* 105.) Injunction should never be permitted to issue when it is even suspected that it will be prostituted to the unworthy purpose of delaying, vexing, and harrassing suitors at law, in the prosecution of their claims. (*Truly v. Wanzer*, 5 *How. U.S.* 141.) Fraud and collusion in procuring the Circuit Court to exercise jurisdiction of an action is good

ground for granting an injunction to restrain its prosecution. (*Sawyer v. Gill*, 3 *Woodb. & M.* 97; 16 *How. Pr.* 246; 8 *How. Pr.* 416; 4 *How. Pr.* 350; *Van Vleck v. Clark*, 38 *Barb.* 316; 24 *How. Pr.* 190.) Proceedings will not be restrained in any state court having jurisdiction in law and equity so that full justice can be done therein. 6 *Sandf.* 612; 5 *Abb. Pr.* 55, 156; 14 *How. Pr.* 178; 25 *Barb.* 529; 5 *Abb. Pr.* 408; but see 25 *Barb.* 531; 5 *Abb. Pr.* 410; generally, 10 *How. Pr.* 244; 11 *How. Pr.* 366; 13 *How. Pr.* 16; 19 *Barb.* 569.

No. 919.

Against Entering Confession of Judgment.

From entering up judgment on a warrant of attorney [*or statement of confession*], executed by the plaintiff to the defendant [*or otherwise naming the parties*], and dated on or about the . . . day of . . . , 18. . , and from commencing any proceedings thereon.

55. Adequate Remedy at Law.—A court of equity will not enjoin the execution of a judgment at law, upon grounds of which the party might have availed himself to defeat the action at law. (*Truly v. Wanzer*, 5 *How. U.S.* 141.) Where a bill in chancery was filed for the purpose of enjoining a judgment at law, obtained upon a promissory note, and the bill did not allege that adequate relief could not be had at law, nor did it show the necessity of interference by a court of equity to obtain a discovery, the bill must be dismissed. (*Hungerford v. Seigerson*, 20 *How. U.S.* 156.) An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where, if the neglect were excusable, full relief might have been had on motion in the original action. (*Borland v. Thornton*, 12 *Cal.* 44.) Where a party failed to obtain the proper certificate of the referee, relying on the verbal assurance of the attorney on the other side that he would agree to a statement, such party cannot be considered free from fault and negligence, and he is not in a position to invoke the aid of a court of equity to enjoin a judgment obtained against him. *Phelps v. Peabody*, 7 *Cal.* 50.

56. Attachment-Creditors.—A prior attaching creditor, whose

attachment has been levied on the personal property of the defendant, cannot, after the recovery of a judgment, be enjoined from selling the property attached, under execution, at the suit of a junior attaching creditor not to do so, but to pursue some other course, to depart from which would result in irreparable mischief to the plaintiff. *Domec v. Stearns*, 30 *Cal.* 114.

57. Confession of Judgment.—As to necessity of a special clause restraining confession of judgment, etc., compare *McCredie v. Senior*, 4 *Paige*, 378; *Ross v. Clusman*, 3 *Sandf.* 676; *Fenner v. Sanborn*, 37 *Barb.* 610.

58. Execution, Restraining.—An injunction may be granted against levying an execution upon particular articles not properly subject to it, although it may not be proper to enjoin all proceedings on the execution. (*Sawyer v. Gill*, 3 *Woodb. & M.* 97.) Particular cases where injunctions against proceedings on execution have been granted or refused: *Amis v. Myers*, 16 *How. U.S.* 492; *Downer v. Brackett*, 5 *Law Rep.* 392; S.C., 21 *Vt.* 599; *Prout v. Gibson*, 1 *Cranch C. Ct.* 389; *Baker v. Glover*, 2 *Id.* 682.

59. Execution, Sale Under.—Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property or estate sold, provided application be made to them in suits in which such decrees are entered within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. (*Goode-now v. Ewer*, 16 *Cal.* 470.) The nature and extent of the relief in such cases are matter resting very much in the sound discretion of the Court. As a general rule, the purchaser will be released and a re-sale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or the parties, to allow the sale to stand. But when the relief is sought in one action from a purchase made upon a mistake of law to the effect of a decree rendered in another action, it seems that the ordinary rule as to mistakes of law should apply, and from such courts of equity seldom relieve. (*Id.*) A sheriff may be enjoined

from selling real property belonging to the wife under an execution against the husband." *Alverson v. Jones and Bogardus*, 10 *Cal.* 9; see, also, *England v. Lewis*, 25 *Cal.* 337; *Ford v. Rigby*, 10 *Cal.* 449; and *Pixley v. Herggins*, 15 *Cal.* 127.

60. Execution and Judgment Void.—If judgment upon which an execution issues and the execution itself are void upon their face, an injunction will not be granted to restrain a sale of property levied on under the execution, or the issuing of any other execution on the judgment. (*Sanchez v. Carriaga*, 31 *Cal.* 170.) A complaint to enjoin the sale of property under an execution, and the issuance of another execution on the judgment, is devoid of equity, which only avers that the judgment and execution are void on their face, and the insolvency of one of the defendants. (*Sanchez v. Carriaga*, 31 *Cal.* 170.) The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ. *Sparks v. De la Guerra*, 14 *Cal.* 108.

61. Injury Irreparable.—Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners. *Held*, that the plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. *More v. Ord*, 15 *Cal.* 206.

62. Judgments, when Enjoined.—All proceedings to enjoin judgment must issue from the Court having the control of such judgment. (*Gorham v. Toomy*, 9 *Cal.* 77.) To authorize the interposition of a court of chancery to enjoin a judgment at law, on the ground of newly discovered facts, the proceedings must be taken by the defendant in the judgment at law. (*Mulford v. Cohn*, 18 *Cal.* 42.) Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence. (*Pico v. Sufiol*, 6 *Cal.* 294.) They will only interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents. Any fact which clearly proves it to be against conscience to execute a judgment at law, and of which a party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or

accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to restrain the adverse party by injunction from availing himself of the judgment obtained at law. (*Marine Ins. Co. v. Hodgson*, 7 *Cranch*, 332; *Truly v. Wanzer*, 5 *How. U.S.* 141.) Where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the time appointed by the proper court of law, courts of equity will not entertain a bill for an injunction on the ground that the original demand was unconscientious. (*Phelps v. Peabody*, 7 *Cal.* 50) If a party enters judgment for too much, or before the whole amount is due, it is not conclusive but only *prima facie* evidence of fraud to avoid the judgment. (*Patrick v. Montader*, 13 *Cal.* 442; overruling *Taaffe v. Josephson*, 7 *Cal.* 356.) Proceedings upon a judgment may be enjoined as to a part, and allowed to proceed as to the residue. (*Dunlap v. Stetson*, 4 *Mas.* 349.) Particular cases in which proceedings on judgments have been restrained: (*Swan v. Bank of United States*, 2 *Brock. Marsh.* 293; 3 *Pet.* 68; *Greenleaf v. Maher*, 2 *Wash. C. Ct.* 493.) A bill to enjoin proceedings upon a judgment at law is not in general considered an original bill. (*Simms v. Guthrie*, 9 *Cranch*, 19, 25; *Dunn v. Clarke*, 8 *Pet.* 134; *Williams v. Byrne*, *Hempst.* 472.) If, however, new parties are introduced, and different interests involved, it will be regarded as being, to that extent, an original bill. *Id.*

63. Mortgage Lien.—Plaintiff has a deed of property from H. and P. Subsequently, N., execution-creditor of H. and P., causes the Sheriff to levy on the property. Plaintiff files his bill to restrain the sale, as casting a cloud on his title. Court below found plaintiff's deed to be in effect a mortgage. *Held*, that the bill must be dismissed; that the purchaser at the Sheriff's sale would only acquire the interest of the judgment-debtors, H. and P.; that plaintiff's rights, as mortgagee, would be unaffected by the sale, and hence there is no necessity for equity to interfere in his behalf. (*Purdy v. Irwin*, 18 *Cal.* 350.) Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of *Wemple v. Pender*, and has not yet got a sheriff's deed. *Held*, that an injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure, not cutting off the rights of the

mortgagor, Pender; that he, being entitled to possession until the Sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our Statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain, his rights not being affected by the proceedings, as he was not a party. *Macovich v. Wemple*, 16 *Cal.* 104.

64. New Trial.—Where a party moves for a new trial and fails, he cannot on the same facts go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 *Cal.* 223.

65. Purchase-Money of Land.—An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of purchase-money of land under covenant for a good title, while in fact the grantor had no title, as long the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession. (*Jackson v. Norton*, 6 *Cal.* 187.) A bill in chancery filed by the purchaser of land against his vendor, to restrain the collection of purchase-money upon the two grounds of want of title in the vendor, and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained. (*Patton v. Taylor*, 7 *How. U.S.* 132.) Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings. *Id.*

66. Vendor's Lien.—A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase-money unpaid. The vendee afterwards mortgaged the same property to a third person, who knew of the vendor's claim for unpaid purchase-money. The vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgagee afterwards foreclosed his mortgage, and was about to sell the property. The purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the Court, on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee. *Held*, that this judgment of the Court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action. *Allen v. Phelps*, 4 *Cal.* 256.

67. Void Judgment by Default.—If a judgment by default be void, because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the Sheriff of the service of summons and copy of complaint, or because of irregularities of the Clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie. (*Logan v. Hillegass*, 16 *Cal.* 200; *Gregory v. Ford*, 14 *Cal.* 141; *Gibbons v. Scott*, 15 *Id.* 286; *Chipman v. Bowman*, 14 *Cal.* 157.) If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same. *Id.*

68. When Injunction will not Lie.—An injunction will not be granted to perpetually enjoin the collection of a judgment upon the ground of fraud, where the judgment was upon default, and granted more relief than the plaintiff was entitled to take from the action. The remedy is by appeal, and if void upon its face, the remedy is by motion in the court in which it is rendered. (*Chapman v. Bowman*, 14 *Cal.* 157; *Logan v. Hillegass*, 16 *Id.* 200; *Bell v. Thompson*, 20 *Id.* 706; *Sanchez v. Carriaga*, 31 *Id.* 170; cited in *Murdock v. De Vries*, *Cal. Sup. Ct., Jul. T.*, 1869.) Where in suit before a justice of the peace, defendant answers disputing plaintiff's claim, and afterwards, on a day set for trial—plaintiff being present, but defendant absent, and no one appearing for him—the Justice renders judgment for plaintiff, without evidence, and “by default,” as the docket reads: *Held*, that if the Justice erred in his judgment, either upon the merits or as to form, the remedy is by appeal, and that such error cannot be corrected by bill in equity to set aside the judgment and enjoin execution and sale thereon. *Hunter v. Hoole*, 17 *Cal.* 418; *Comstock v. Clemens*, 19 *Id.* 77.

No. 920.

Against Proceedings at Law—Ejectment.

To restrain the defendant from proceeding further against the plaintiff, in this action commenced against him in the District Court of the

..... Judicial District of this State, for the recovery of the possession of [*describe the premises*], and, also, from instituting any action or proceeding in any new or other action at law, for the recovery of the possession of said premises, or any part thereof, either in the said Court or in any other court.

69. Equitable Matter.—An injunction to stay an ejectment suit until matter of equity can be examined will not be allowed, except upon condition that judgment in the ejectment be entered. (*Turner v. American Baptist Missionary Union*, 5 *McLean*, 344.) Where a right to real estate has been satisfactorily established at law, a court of equity will interfere by injunction to prevent further litigation, without inquiring particularly what number of trials in ejectment have been had. *Craft v. Lathrop*, 2 *Wall. jr. C. Ct.* 103.

70. Grain Crop as Realty.—A grain crop was part of the land, and plaintiffs were entitled thereto if entitled to recover the land; and, *Second*, That an order made by the Court *pendente lite*, restraining defendants from alienating or incumbering the land during the litigation, and appointing a receiver to take possession, harvest and preserve the grain crop, was properly made. *Corcoran v. Doll*, 35 *Cal.* 476.

71. Introduction of Evidence.—Defendants, claiming title under a Mexican grant, and a patent issued upon its confirmation by the United States, bring ejectment against plaintiffs for certain premises in their occupation; plaintiffs, claiming as United States pre-emptioners, then file their bill in the same court to enjoin defendants from introducing in evidence or using the survey, plat or patent, on the trial of the ejectment, until the determination of an action averred to be pending in the United States Circuit Court, by the United States against defendants and others claiming with them, to annul the survey, plat and patent, on the ground of fraud in the survey, and in procuring the patent, the bill also averring such fraud. *Held*, that injunction does not lie; that the patent, until set aside, is conclusive evidence of the validity of the grant, of its recognition and confirmation, and also of the regularity of the survey, and of its conformity with the decree of confirmation; and that defendants, claiming to be pre-emptioners upon land of the United States, having no standing in court to resist the patent. *Ely v. Frisbie*, 17 *Cal.* 250.

72. Restraining Execution.—After judgment for the plaintiff in ejectment, brought for non-payment of rent, the defendant cannot show, in a bill of equity brought to restrain the execution of the judgment, that the rent ought, under the stipulations of the lease, to have been reduced in amount. *Sheets v. Selden*, 7 *Wall.* 416.

73. Title Acquired Pendente Lite.—Relief will be granted by way of injunction in equity, where the tenant has, pending the suit, acquired a title paramount to that of the demandant, if he cannot avail himself of it as a defense to the original suit at law, or cannot after recovery maintain an action to regain the possession. *Bright v. Boyd*, 1 *Story C. Ct.* 478.

74. Who may Enjoin.—A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. (*Treadwell v. Payne*, 15 *Cal.* 496.) The fact that suit in ejectment has been commenced against the judgment-debtor by the real owner does not entitle him to enjoin the judgment. He can only avail himself of the covenants of his grantor when he has been evicted, unless he offers to surrender the land to his grantor. Neither does the allegation that the purchaser (plaintiff in equity) has put valuable improvements on the land, and that he has paid a portion of the purchase-money, and that his grantor and judgment-creditor is insolvent and without visible property, take the case out of the rule. (*Id.*) One who is the owner of land, and in possession of the same, is not entitled to an injunction to restrain a sheriff from executing a writ of restitution, issued on a judgment, rendered against third parties, to which judgment the plaintiff is a stranger. *Tevis v. Ellis*, 25 *Cal.* 516; *Tomlinson v. Rubio*, 16 *Cal.* 202, disapproved.

NUISANCES.

No. 921.

Against Building a Railroad on Plaintiff's Land.

From entering upon any part of the lands hereinafter described, for the purpose of constructing a railroad

thereon, or from laying down a railroad track thereon, or from maintaining a railroad thereon, or running cars across, over, or upon the said land. The said premises are known as, and bounded and described as follows: [*description.*]

75. Condemnation of Land.—Where the statute under which the proceedings for the condemnation of land for road purposes is taken is unconstitutional, or its provisions are not strictly pursued, or notice is not given to the owner of the land, or the compensation is not tendered to him, a perpetual injunction against opening the road will be granted. (*Curran v. Shattuck*, 24 *Cal.* 431.) A perpetual injunction against opening a road, under proceedings which have been taken, does not prevent laying out a road at any future time over the same land, whenever the proper steps are taken to acquire the right of way, and the right has been secured. (*Id.*) As to trespasses by a railroad, see *Williams v. N.Y. R.R. Co.*, 16 *N.Y.* 111; reversing *S.C.*, 18 *Barb.* 222.

No. 922.

Against Laying a Railroad in the Streets of a City.

From entering into or upon Montgomery Street, in said City, for the purpose of laying or establishing a railroad therein, and from digging up or subverting the soil, or doing any other act in those streets tending to incumber them, or to prevent the free and common use thereof, as the same have been heretofore enjoyed, and from laying down any ties or railroad iron therein.

76. Extension of Railroad Track.—An injunction lies at the suit of the people to restrain a railroad company from laying an extension of their track in the streets of the city without authority of law. (*People v. Third Av. R.R. Co.*, 45 *Barb.* 129; *S.C.*, 30 *How. Pr.* 121. Or to lay a railroad track in a peculiar case. (*Dry Dock R.R. Co. v. N.Y. and Harlem R.R. Co.*, 30 *How. Pr.* 39.) But not after the Legis-

lature has granted right to lay the track. (*Sixth Av. R.R. Co. v. Kerr*, 45 *Barb.* 138; affirmed, S.C., 28 *How. Pr.* 382.) As to the discontinuance of a portion of a railroad track, see, (*People v. Albany and Vt. R.R. Co.*, 11 *Abb. Pr.* 136.) As to the nuisance of lands appropriated for a railroad, *Bostock v. N.S. Railway*, 3 *Sm. & Giff.* 283.

77. Public Nuisances.—Public nuisance may be enjoined if it subjects a party to special injury. (*Milhan v. Sharp*, 27 *N.Y.* 611; 17 *Barb.* 435; 9 *How. Pr.* 102; 28 *Barb.* 228; 7 *Abb. Pr.* 220.) An individual may have an injunction to prevent a public nuisance when such nuisances created will be an extraordinary injury, irreparable in damages, or irremediable at law, or without a multitude of suits. (*Parrish v. Stephens*, 1 *Or.* 73.) Where a plaintiff has proved his right to an injunction against a nuisance, it is not for the Court to inquire how the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the nuisance is physically impossible. But when the difficulty of removing the injury is great, the Court will suspend the operation of the injunction for a time, with liberty to the defendant to apply for an extension of time. (*Attorney-General v. Colney Hatch Lunatic Asylum*, *Law Rep.* 4 *Ch.* 146.) As to injunctions for nuisances generally, see (12 *Ohio*, 387; 1 *McLean*, 337; 3 *Sumner*, 189; 13 *Pick.* 169; 22 *Pick.* 333; *Greene's Ch.* 234; 6 *John. Ch.* 439; 21 *Pick.* 344; 2 *Ashmead*, 211; 3 *Ired. Ch.* 301; 7 *Porter*, 238; 9 *Pr. Rep.* 553; 7 *Abb. Pr.* 220; 14 *N.Y.* (4 *Kern.*) 526; 13 *How. Pr.* 42; 1 *N.Y. Code Rep. (N.S.)* 208.) Public nuisance, see (2 *Duer* 663; S.C., 14 *N.Y.* (4 *Kern.*) 526.) Several persons may join in the prayer for injunction. 3 *Sand.* 129, n.; 1 *Barb. Ch. R.* 59; overruling *Hudson v. Maddison*, 12 *Sim.* 416; 5 *Jur.* 1, 194; *Reed v. Gifford*, *Hopk.* 419.) Nothing can be restrained as a nuisance which the Legislature has authorized. 14 *N.Y.* 575; 2 *Duer*, 621; but see, 1 *Abb. Pr.* 473, 474.

78. Railroad, when a Nuisance.—When a railroad is a nuisance, *e.g.*, in a crowded highway. (14 *N.Y.* 524; but see *Id.* 531; 13 *Barb.* 656; 7 *Id.* 548, 556.) The Legislature may authorize such a road, but no inferior power can do so; (14 *N.Y.* 524;) and if laid without legal authority it is certainly a nuisance, and may and ought to be restrained. (7 *Abb. Pr.* 220; 3 *Id.* 293; and see 14 *N.Y.* 526.) The establishment and running of a horse railroad in a public street imposes an additional burden on the land, and may be enjoined at the suit of an adjoining proprietor who owns to the middle of the street—

that is, if the railroad company have not a right to do so. *Craig v. Rochester City and B. R.R. Co.*, 39 *N.F.* 404.

79. Steam Engine.—An injunction may be issued to restrain defendant from running his steam engine so close to plaintiff's premises as to jar his house. *McKeon v. Lee*, 28 *How. Pr.* 238.

No. 923.

Against Authorizing the Laying of a Railroad in a City Street.

That an injunction-order may be issued by this Court, directed to the said defendants, and each of them, their agents, servants, and attorneys, restraining and enjoining them, and each and every of them, and all others acting in aid or assistance of them, from [*here state what acts the parties are restrained from*], or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double or any track for a railway in Battery Street, from Jackson to Bush Streets, in the City and County of San Francisco, or any railway whatever in said Battery Street, or of breaking or removing the pavement, or in any other manner obstructing the said street, preparatory to or for the purpose of laying or establishing any railway therein, or from maintaining or running or operating a railroad therein.

79. Form.—For another form, see *People v. Sturtevant*, 9 *N.F.* 263.

*No. 924.**Against Laying Gas Pipes in a Certain Street.*

[TITLE.]

From entering into or upon Stevenson Street, in said City, for the purpose of laying gas pipes therein, and from digging or breaking up the soil, or from laying gas pipes in said street, or doing any other act in said street to incumber it, or to prevent the free and common use thereof.

80. Appropriation of a Public Street.—Where plaintiff seeks an injunction to restrain the appropriation of a public street, on the ground of a special injury to him by preventing access to his adjoining lot, he should specify this grievance in his complaint; a general charge that the work will be specially injurious to him is not sufficient. But if no motion is made to require the plaintiff to reform his complaint in that respect, and no objection is made upon the trial to the introduction of evidence tending to show such injury, the objection will be considered as waived. *Wetmore v. Story*, 22 Barb. 414; S.C., 3 Abb. Pr. 262.

81. Breaking up Streets.—The breaking up of the street of a town, for the purpose of laying gas pipes, without lawful authority, will be enjoined in equity. (*Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 304, not followed.) But it is not such a nuisance as will be enjoined in equity, on an information at the relation of a rival gas company, reversing the decree of *Attorney-General v. Cambridge Consumers' Gas Co.*, *Law Rep.* 4 Ch. 71.

*No. 925.**Against Continuance of Slaughter House.*

From occupying a building erected by the defendant C. D., on the east side of Harris street, between Townsend and Brannan, in the City of San Francisco, as a

slaughter house, and from slaughtering any animals in such building, and from permitting the building to be used as a slaughter house by others.

No. 926.

Burning Brick.

From burning or manufacturing, or causing to be burnt or manufactured, bricks on a certain piece of land or premises in the defendant's possession [*describe premises*], situate in the Town of, in the County of, and whereon is erected a brick-kiln, or from permitting or causing bricks to be burned or manufactured thereon.

No. 927.

Against Erecting, and to Compel Removal of Buildings.

From continuing the erection of a certain projected building on the garden, grounds, or plot of ground, described as follows: [*description*], or any part thereof.

No. 928.

Against the Diversion of Water.

[TITLE.]

From dividing the waters, or any part thereof, of the American River, at, so that the whole of said waters will not flow down its natural channel to, so that the whole of said waters may be conducted in plaintiff's ditch to his reserve at

82. Diverting Water.—Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear River, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes, that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict, and judgment for \$21,000 damages. *Held*, that the averments are insufficient to entitle plaintiffs to an injunction, the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. (*McDonald v. Bear River and Auburn Water and Mining Co.*, 15 *Cal.* 145.) That an injunction to restrain a diversion of the water of a stream by a canal in Rhode Island, made by citizens of that State, whereby mills in Connecticut are injured, may be granted in a suit in the Circuit Court for the district of Rhode Island, brought by citizens of Connecticut, the owners of the mill, *Stillman v. White Rock Manufacturing Co.*, 3 *Woodb. & M.* 538.

83. Diversion for Irrigation.—The construction of a reservoir across the bed of a ravine, for the purpose of collecting the water flowing down the same, to be used in irrigating a garden or fruit trees, gives the party constructing the same a vested right of property in the reservoir, and the right to have the water flow into the same, of which he cannot be divested by persons subsequently entering for mining purposes, and a court of equity will enjoin miners thus entering from injuring the reservoir or diverting the water therefrom. (*Rupley v. Welch*, 23 *Cal.* 452.) When there is no pretense that any injury was occasioned willfully by the defendant, and there is no finding of unskillfulness, an injunction will not issue to prevent the exercise of his right to irrigate his crops, although an annoyance or injury may be thereby occasioned to the plaintiffs. *Gibson v. Puchta*, 33 *Cal.* 310.

84. Watercourse.—Injunction will lie to compel defendants to restore the waters to their natural beds or channels. (6 *Johns. Ch.* 497; 2 *Code R.* 100; 6 *How. Pr.* 89; 3 *Sumn.* 183; *Corning v. Troy Iron and Nail Co.*, 39 *Barb.* 311.) Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent future injury is proper. (*Marius v. Bicknell*, 10 *Cal.* 217; consult, also, *Olmstead v. Loomis*, 9 *N.H.* 428; *Belknap*

v. Trimble, 3 *Paige*, 600; *Gardner v. Village of Newburgh*, 2 *Johns. Ch.* 164; *Corning v. Troy Factory*, 6 *How. Pr.* 94; *Bruce v. Del. and Hud. Canal Co.*, 19 *Barb.* 379.) Where the right of the use of running water is based upon appropriation, and not upon ownership of the soil, priority of appropriation gives the superior right. (*Ohio Co. v. Carpenter*, 4 *Nev.* 534.) Possession or actual appropriation must be the test of priority in all claims to the use of water. *Kimball v. Gearhant*, 12 *Cal.* 29; *Nev. Co. v. Kidd*, 28 *Cal.* 673.

No. 929.

Against Flooding Mining Claim or Mill Dam.

From permitting the waters from the flood gates of the defendant's reservoir to be open, thereby flooding the said plaintiff's mining claim in cañon, and thereby making it inconvenient or impossible for plaintiff to work said mine.

86. Water for Mining Purposes.—A complaint alleging that plaintiffs had for a long time conveyed water from a stream, for mining purposes, by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof, when defendants wrongfully diverted the same and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. (*Tuolumne Water Co. v. Chapman*, 8 *Cal.* 392.) No equitable remedy can be had for a mere past diversion of a watercourse; but when the injury is continuing relief may appropriately be sought in equity. (*Id.*) Plaintiffs are owners of mining claims located in the bed of a creek, and defendants own claims situated on a hill in the vicinity. The refuse matter washed from defendants' claims is deposited on plaintiffs' claims to such an extent as to render the working of them impracticable. Plaintiffs' claims were first located, and are valuable only for the gold they contain. *Held*, that plaintiffs are entitled to damages for the injuries done their claims by such deposit, and to an injunction against the same in future; that the enjoyment of their claims lies in the use necessary to obtain the gold, and that to interrupt this use is to take away the oppor-

tunity to enjoy, and defeat the object for which they were located and taken possession of. *Logan v. Driscoll*, 19 *Cal.* 623.

No. 930.

Against Building Pier or Wharf.

From constructing or causing to be constructed a certain wharf at, whereby vessels cannot enter or leave with convenience or safety at plaintiff's wharf, which wharf extends from the foot of Street into the Bay [*or state facts as they exist*].

87. Commerce.—That a nuisance injurious to the commerce of a town may be enjoined at the suit of a private individual owning property in such town, and being himself engaged in its commerce, see *Works v. Junction Railroad*, 5 *McLean*, 425.

88. Ferry Rights.—An injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or goods in the ordinary prosecution of commerce, without the regularity or purpose of ferry trips; that remedy applies only to one which is run avowedly as a ferry boat. *Conway v. Taylor*, 1 *Black.* 603.

86. Obstructing Highways.—It is material for a complainant suing for an injunction to prevent a threatened destruction of a river, to state that he is engaged in navigating the waters of the same. *Spooner v. McConnell*, 1 *McLean*, 337.) A bill was filed to restrain a railway company from placing an obstruction partly on a public way and partly on the land of the plaintiff, a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury caused by the continuance of the obstruction would be irreparable, and that the act was done without any color of title. On demurrer, *held*, that this was a case in which the Court would enjoin trespass by a stranger. *London and N.W. Railroad Co. v. Lancashire and Yorkshire Railroad Co.*, 4 *Law Rep.* 4 *Eq.* 174.

90. Wharfs.—Where the Court is satisfied that a wharf erected in tide waters and upon soil thereunder belonging to the State is not a

public nuisance, an injunction should be refused or dissolved, if one has been temporarily granted. (*People v. Davidson*, 30 *Cal.* 379.) The district courts, as courts of equity, have no power to decree the destruction, or to enjoin a purpresture caused by the erection of a wharf in tide waters, and upon the soil thereunder belonging to the State, without a license from the State, unless it is or will be a public nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be a hindrance to the execution of some legislative act relating to fishery or to commerce or navigation. (*Id.*) The remedy to prevent erecting a nuisance in a bay or navigable river is by injunction at the suit of the Attorney-General. (2 *Wat. Eden on Inj.* 259; 14 *N.Y.* 526; 2 *Astr.* 603; *People v. Vanderbilt*, 26 *N.Y.* 287; 28 *N.Y.* 396; 25 *How. Pr.* 139; affirmed, S.C., 24 *Id.* 301; 38 *Barb.* 282.) But an injunction will not be granted to restrain the erection of what may possibly prove a nuisance. *Ramsey v. Riddle*, 1 *Cranch C. Cl.* 399.

PARTNERSHIP PROPERTY.

No. 931.

Against Selling or Disposing of Property.

That defendant be restrained from selling, assigning or otherwise disposing of any of the property, personal or real, belonging to the co-partnership above named, and from collecting, receipting, or otherwise handling said property or any part thereof, except to retain the same; from changing position of or transporting, moving or conveying any of the personal property or moneys of said co-partnership.

91. Interference with Partnership's Property.—An injunction forbidding defendant to interfere with “any of the said partnership property, or from collecting the partnership debts or other moneys,” but containing no reference whatever to any particular firm or co-partnership business, is not sufficiently definite to put the defendant in contempt. *Moat v. Holbein*, 2 *Edw.* 188; consult, also, 4 *Beav.*

503; 4 *Sand.* 716; 8 *Vesey*, 317; 12 *Beav.* 414; 3 *Beav.* 388; 3 *Macn. & Gor.* 84, 88; 9 *Sim.* 609; 4 *Abb. Pr.* 394.

PUBLIC INJURIES ENJOINED.

92. How Enjoined.—Public injuries may be restrained on application of the Attorney-General. (*Davis v. Mayor of N.Y.*, 2 *Duer*, 663; 14 *N.Y.* 506; *Mechling v. Kittaning Bridge Co.*, *Grant's Cases (Pa.)* 419.) Where a bill is filed by the people, on the relation of the Attorney-General, to enjoin the State Treasurer from paying money out of the Treasury, on the ground of the unconstitutionality of the act directing the Treasurer to make the payment, and the Court, on the final trial, deny the injunction, the judgment denying the injunction should not contain a clause adjudging and decreeing that the Treasurer pay over the money as required by the law. *People v. Pacheco*, 27 *Cal.* 227.

PUBLICATION ENJOINED.

*No. 932.**Against Publishing Book.*

From printing, publishing, selling or exposing for sale, or causing or being in any way concerned in the printing, publishing, or selling, or exposing to sale, or otherwise disposing of any copies of [*describe the book*], or any other book purporting to be or to resemble the book so printed, published, and sold by or for plaintiff.

93. Copyright.—Although an account of profits may be decreed to the owner of a copyright, as incidental to the relief by injunction, it must be prayed for in the bill. It cannot be decreed if the bill contains neither a prayer for an account nor for general relief. (1 *Russ. & Myl.* 73; 2 *Hare*, 550; *Stevens v. Cady*, 2 *Curt. C. Ct.* 200.)

94. Legal Proceedings.—Publication of legal proceedings cannot be restrained by injunction. (*Wood v. Marvine*, 3 *Duer*, 674.) Publication of a libel cannot be restrained. *Brandreth v. Luce*, 8 *Paige*, 24.

95. Manuscript.—The publication of a manuscript, or any substantial part thereof, without the author's consent, may be enjoined. (*Bartlett v. Crittenden*, 5 *McLean*, 32; S.C., 7 *West. Law J.* 49.) Thus, the publication of private letters, without the writer's consent, may be restrained. *Bartlett v. Crittenden*, 5 *McLean*, 32; S.C., 7 *West. Law J.* 49.

96. Publication.—As to restraining publication, see *Woolsey v. Judd*, 4 *Duer*, 385; 11 *How. Pr.* 43, and other cases there cited; 1 *Macn. & Gor.* 25; *Hall & Tor.* 1; 4 *Duer*, 379; 2 *Swanst.* 424; *Ambler*, 737; 2 *Atk.* 342; 1 *Hall & Tor.* 28; 3 *Law J. (Ch.)* 209; see "*Trade Mark*," *Post*.

No. 933.

Against Publishing Private Letter.

From printing, publishing, selling or causing to be sold or exposed for sale, or circulating, or in any manner, either by writing or otherwise, making public a letter written by, on or about the day of, 18.., and forwarded to at, or any part thereof [*or* for a number of letters written by A. B. to C. D., between the day of, 18.., and the day of, 18..].

97. Attorney at Law.—And so an attorney who has appeared for one party in a cause was enjoined from appearing for the other party, and from communicating any knowledge which the confidence of his relation had given him. (19 *Vesey*, 261.) This is certainly law as well as good morals, but it is feared that even a restraining order would not succeed in keeping those who desired to from divulging facts within their knowledge. It would seem a motion for such an injunction may be made in the course of such action, without commencing a new action against the attorney. *Id.*

*No. 934.**Against Use of Secret in Trade.*

From selling, or causing or procuring to be sold, under the title and designation of "Walker's Vinegar Bitters," any medicine made or manufactured by the defendant, or by or under his order or direction; and from making or compounding any medicines according to the secret in the complaint mentioned, etc., and from in any manner using the secret of compounding the said medicines, or any part thereof.

NOTE.—A similar form will be found in *Morrison v. Moat*, 9 *Hare* (41 *Eng. Ch.*) 241.

98. Property Held in Trust.—Where a specific article, or a specific sum of money, is held in trust for plaintiff by defendant, the Court will enjoin the latter from disposing of or removing it, as a breach of trust, how ample soever the pecuniary responsibility of the defendant may be. (3 *E. D. Smith*, 296.) It is aptly said by the Court in the following case, that as it presents an element of trust, it is so peculiarly equitable in its nature, that an injunction will be granted under circumstances which but for the element of trust would be entirely insufficient. So, a court will not restrain the publication of a secret communicated under a contract not to reveal it, but it will certainly enjoin the same if acquired surreptitiously and in breach of confidence. 1 *Jack. & W.* 394.

99. Publication of a Secret, although in violation of a contract, cannot be restrained (11 *How. Pr.* 384; 3 *Meriv.* 160; 2 *Id.* 450), unless obtained through surreptitious means, when it may be. (1 *Jack. & W.* 394.) And where defendant had been in the confidential employ of plaintiff, and had taken extracts from his books and papers, and afterward threatened to publish the same, he was not only enjoined from so doing, but also from keeping any copies of such extracts in his possession. 1 *Sim.* 483.

100. Trusts.—A *cestui que trust* may maintain a bill for an injunction against his trustee, to prevent his collecting, appropriating, or disposing of the trust property improperly. (St. Luke Hospital *v.* Barclay, 3 *Blatchf.* 259.) An injunction may be granted to restrain two or three trustees of a private trust from making a contract to the prejudice of one of their *cestuis que trust*, and to their profit, without the assent of the third trustee; he being the representative of the *cestui que trust* who will be prejudiced by such contract. Sloo *v.* Law, 3 *Blatchf.* 459.

PUBLIC OFFICERS.

*No. 935.**Quo Warranto—From Usurping Office.*

From usurping, taking possession of, interfering with, or in any manner disturbing the plaintiff in the use, enjoyment, advantages or benefits, of [*describe office*], and from taking the fees or emoluments of said office, and from doing any act under or by the name of said office.

101. Irregular Assessment.—The fact that the assessment for state and county taxes for 1855-6, in San Francisco County, was not based on the valuation of the City Assessor, as required by the Act creating the Board of Supervisors, passed in 1851, is not a sufficient ground for an injunction upon the collection of the taxes, as the party could have appealed to the Board of Equalization if aggrieved. (Merrill *v.* Gorham, 6 *Cal.* 41.) Where an assessment and sale for taxes would be void, and the matters making them void do not appear on the face of the Tax Collector's deed, but must be shown by intrinsic proof, and the deed upon its face would be *prima facie* valid, injunction lies to restrain the sale. (Burr *v.* Hunt, 18 *Cal.* 303.) An individual whose property is assessed without authority from a municipal corporation, for a local improvement, may maintain an action to enjoin its collection, not only on the ground of avoiding a multiplicity of suits, but, also, to remove the cloud on the title; (14 *N.F.* 434;) and the objection that all persons united in interest are not joined as plaintiffs is waived if not set up by the pleading. Ireland *v.* City of Rochester, 51 *Barb.* 414.

102. Officers.—Injunction against public officers by their individual names would not bind their successors or the public. (*Magee v. Cutler*, 43 *Barb.* 239.) As to injunction against officers, generally; restraining them from acting, see (19 *Barb.* 175; 2 *Abb. Pr.* 251.) As to officers of corporations, see 3 *Smale. & Giff.* 283; 19 *Eng. L. and Eq. R.* 307.

103. Taxes and Assessments.—In all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof; and in such case to grant an injunction is error. (*Minturn v. Hays*, 2 *Cal.* 590.) *Query*, whether a taxpayer can interfere by injunction to restrain the performance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect at some future time, if certain other things be done, might be to subject his property to taxation. (*Pattison v. Board of Supervisors of Yuba County*, 13 *Cal.* 175.) An injunction will not lie to restrain the collection of taxes due on property, unless it be shown that the injury resulting from the collection, to the owner, would be irreparable. An averment of this character must appear in the bill, and, if denied, it must be sustained at the hearing. *Ritter v. Patch*, 12 *Cal.* 298.

104. Tax Collector.—The collection of a tax, even though illegal, if attempted to be collected by legal officers, cannot be restrained by injunction. So held in (*Wilson v. Mayor of N.Y.*, 1 *Abb. Pr.* 4; *Chemical Bank v. Mayor of N.Y.*, *Id.* 79; *N.Y. Life Ins. Co. v. Supervisors of N.Y.*, *Id.* 250; 4 *Duer*, 192; *Dodd v. City of Hartford*, 25 *Conn.* 237.) And the same is held in the case of an assessment by local authorities. (*Haywood v. City of Buffalo*, 14 *N.Y.* 534; *Blake v. City of Brooklyn*, 26 *Barb.* 301; *Bowton v. City of Brooklyn*, 15 *Id.* 375; *Mayor etc. v. Meserole*, 26 *Wend.* 132; *Sayre v. Tompkins*, 23 *Mo.* 443; see 3 *Ohio*, 73; 6 *Ohio*, 53; 16 *Id.* 574; 18 *Id.* 318; 3 *Id.* 370; 1 *Johns. Ch.* 610; 9 *Johns.* 507; 9 *Wheat.* 738; 16 *Barb.* 392; 4 *E. D. Smith*, 675; 4 *Duer*, 192; 14 *N.Y.* 534; *Mut. Benefit Life Ins. Co. v. Board of Supervisors*, 8 *Bosw.* 683; *Susquehanna Bk. v. Supervisors of Broome*, 25 *N.Y.* 312; but see *Foot v. Linck*, 5 *McLean*, 616; *Woolsey v. Dodge*, 6 *Id.* 142.) As to tax collectors generally, see (18 *How. U.S.* 340; 1 *Abb. Pr.* 4; *Id.* 79; *Id.* 250; 4 *Duer*, 192; 5 *Abb. Pr.* 213; 25 *Conn.* 237; 5 *Abb. Pr.* 171; 4 *Abb. Pr.* 333; *Id.* 121; but see 6 *Id.* 296; 9 *How. Pr.* 32; 19 *Barb.* 167; 23 *Id.* 370; 2 *Duer*, 618; 1 *Abb. Pr.* 466; 14 *N.Y.* 531; 7 *Abb. Pr.* 12.) Nor is

interference proper on the ground that the officials who imposed the assessment were legally disqualified from holding office. (*Thatcher v. Dusenbury*, 9 *How. Pr.* 32.) But the United States Supreme Court has enjoined the collection of an unconstitutional tax. *Dodge v. Woolsey*, 18 *How. U.S.* 340.

105. Tax Sale.—A court will not restrain a sale for taxes, when it is apparent upon the face of the proceedings, upon which the purchaser must rely to make out a *prima facie* case, to enable him to recover under the sale, that the sale would be void. (*Bucknall v. Story*, 36 *Cal.* 67.) A bill in equity will lie to restrain a sale of property for illegal taxes, since a tax deed is made *prima facie* evidence of title. (*Palmer v. Boling*, 8 *Cal.* 388; *Fremont v. Boling*, 11 *Cal.* 387; overruling *Denio v. Hays*, 2 *Cal.* 463; *Robinson v. Gaar*, 6 *Cal.* 275.) Or the sale of real property under an illegal assessment. (See *Heywood v. City of Buffalo*, 14 *N.Y.* 545; *Van Doren v. Mayor of New York*, 9 *Paige*, 390; also *Matthews v. Mayor of New York*, *Trans. Feb.* 10, 1860.) Where an assessment is laid upon land in the City of San Francisco, it is not within the province of a court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the City. (*Weber v. The City of San Francisco*, 1 *Cal.* 455.) It seems that if the injunction bill had been filed before the work was commenced, the Court would have felt bound to inquire into the regularity of the assessment. *Id.*

106. When Injunction will and will not Lie.—An injunction may be issued to restrain public officers from proceedings taken under an unconstitutional statute which involves the imprisonment of the plaintiff. (*Holt v. Commissioners of Excise*, 31 *How. Pr.* 331.) That portion of an act prescribing that no injunction shall be issued against the commissioners appointed for the sale of the State interest within the water line, is invalid. (*Guy v. Hermance*, 5 *Cal.* 73; *Stone v. Elkins*, 24 *Id.* 127.) An injunction restraining the city officers from making payment of sums for which the City is liable cannot be sustained. (*Hecker v. Mayor of N.Y.*, 18 *Abb. Pr.* 369; 28 *How. Pr.* 211.) Nor will the Court restrain public officers from issuing bonds authorized by law, upon apprehension that the public officer will misapply their avails. *Faulkner v. Metcalf*, 43 *Barb.* 255.

107. Who Cannot be Enjoined.—The Government cannot be

enjoined. (*Hill v. United States*, 9 *How. Pr.* 386; *United States v. Lenmore*, 4 *Id.* 286.) The President cannot be enjoined; (*Mississippi v. Johnson*, 4 *Wall. U.S.* 475;) nor heads of United States departments. (1 *Cranch*, 166; 12 *Pet.* 524; *Id.* 609; *Id.* 497; 6 *How. U.S.* 100; *McElrath v. McIntosh*, 1 *Law Rep. (N.S.)* 399; *Walker v. Smith*, 21 *How. U.S.* 579.) In a case where the process of injunction cannot reach the principal, who is the true source of the mischief, and in the case of a sovereign State exempt from all judicial process, an injunction may be awarded to restrain the agent who is to be made the instrument of the wrong. The privilege of the principal is not communicated to the agent. *Osborn v. Bank of United States*, 9 *Wheat.* 738.

IN TRESPASS.

No. 936.

Against Undermining Plaintiff's Land.

From digging, undermining, excavating or removing any soil from any land adjoining the plaintiff's premises [*describing them*], which shall cause the plaintiff's land, by reason of the removal of the said earth, to fall away or subside.

FORM.—See, as to form on this subject, *Farrand v. Marshall*, 19 *Barb.* 380.

108. Discretion of Court.—The granting and continuing of injunction in cases of alleged trespasses on land claimed by plaintiff, where the injury is likely to be irreparable, are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured. (*Hicks v. Compton*, 18 *Cal.* 206.) In the case of (*Stade v. Sullivan*, 17 *Cal.* 102), the Supreme Court refused to interfere with the discretion of the Court below, in denying an injunction sought by a settler upon public mineral lands, to protect his improvements—a dwelling house, milk house, barn, garden, dam, etc.—against miners who were working the bed of a ravine a short distance in front of the house. See facts.

109. Stopping Work of Mine.—If the plaintiffs permit the defendants to remain in possession of a mining claim several months, without interference, working it as their own, and expending large sums of money in developing it, a court of equity will require a very clear and strong showing to induce it to grant or entertain a preliminary injunction to stop the work. (*Real del Monte Co. v. Pond Co.*, 23 *Cal.* 82.) When the title to the property is in dispute, the question whether the creditors are solvent and able to respond in damages forms an important element in passing upon an application for an injunction pending the litigation. *Id.*

110. Tearing Down Fences.—When a complaint, in an action to restrain the commission of trespasses, avers that the defendant has torn down the fences of plaintiff, and entered his close for the purpose of opening a private road across plaintiff's land, under a claim of right founded on an order of a Board of Supervisors laying out a road, and does not state that the right has been settled in an action at law, and that the defendant continues his acts after a court of law has decided against him, it does not state facts sufficient to constitute a cause of action. (*Leach v. Day*, 27 *Cal.* 643.) Courts of equity may restrain the commission of a trespass about to be committed, by taking down fences and opening a road through the plaintiff's land, in pursuance of an order of the Board of Supervisors, prematurely made. (*Grigsby v. Burtnett*, 31 *Cal.* 406; *Moore v. Massini*, 32 *Id.* 590.) The threatened injury must be irreparable; (9 *Wend.* 571; 7 *Johns. Ch.* 315; *Sixth Av. R.R. Co. v. Kerr*, 28 *How. Pr.* 382; affirming *S.C.*, 45 *Barb.* 138;) and irremediable. (*Spooner v. McConnell*, 1 *McLean*, 337.) An allegation in the complaint that plaintiff was in possession of the land as owner when defendant entered is a sufficient statement of title in a suit for injunction to restrain trespass. *Hicks v. Compton*, 18 *Cal.* 206.

111. When Injunction will not Lie.—Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently H., a foreigner, built a house on and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation: *Held*, that the plaintiff sets forth no principle on which to base a claim. (*O'Connor v. Corbitt*, 3 *Cal.* 370.) For an apprehended trespass, unless under very special circumstances, injunction will not be allowed. For examples as to circumstances which have been considered sufficient, see (*Mayor of N.Y. v.*

Conover, 5 *Abb. Pr.* 178; S.C., *contra*, 5 *Id.* 263; Jerome v. Ross, 7 *Johns. Ch.* 331; and see generally on this topic, 5 *Abb. Pr.* 180; 12 *How. Pr.* 218; 7 *Johns. Ch.* 331; 3 *Code Rep.* 143; 1 *Barb.* 317.) Injunction cannot be granted, however clear the original right may be, if the trespass be complete and perfect. (*Moreland v. Richardson*, 22 *Beav.* 604; *Deere v. Guest*, 1 *Myl. & Cr.* 622; *Att'y-Gen. v. N. J. R.R.*, 2 *Green Ch.* 141; see *Perkins v. Warren*, 6 *How. Pr.* 348.) Nor will it be granted where the party complaining has a complete and adequate remedy at law. *Leach v. Day*, 27 *Cal.* 643.

TRADE MARKS.

No. 937.

From Using Plaintiff's Trade Mark.

From selling, exposing for sale, or causing to be sold [*describe what*], or any other article or thing with similar labels, or in like boxes, or with like or similar devices thereon, in any manner or by any means, so that the article so put up or sold will be taken for that which this plaintiff has hitherto put up and sold under the name and style and by the device, etc., of [*describe device particularly*].

112. Deception.—Where a deception is practiced upon the public by one who uses or imitates the trade mark of another, with a fraudulent intent, to recommend to purchasers an article similar in appearance to one already made and favorably known in the market, an injunction will be granted to restrain it. *Coffeen v. Brunton*, 4 *McLean*, 516; S.C., 7 *West. Law J.* 59.

113. Form.—For another form, see *Croft v. Day*, 7 *Beav.* 84.

114. Picture.—A picture may be matter of trade mark. *Falkenburg v. Lucy*, 35 *Cal.* 52.

*No. 938.**Against Infringement of Sign.*

From running, or in any manner using or causing to be used, for the conveyance of passengers, any omnibus, having painted, stamped, printed, or written thereon the words or names, "London Conveyance," or "Original Conveyance for Company," or any other names, words, or devices, painted, stamped, printed, or written thereon, in such manner as to form or to be a colorable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs.

NOTE—This form was sustained in *Knott v. Morgan*, (15 *Eng. Ch.*) 3 *Keen*, 213.

WASTE.

*No. 939.**Affidavit to Obtain Order to Restrain Waste.*

[VENUE.]

A. B., the plaintiff above named, being duly sworn, says as follows:

I. This action is brought [*state the object of the action*], and all the allegations of said complaint are true, to the knowledge of the deponent.

II. On or about the days of the present month of, the defendant proceeded to cut and take off, and put up in cord-wood, the wood and timber then growing and being on said premises, and has now

cut and piled up on said premises, ready to be taken therefrom, as I am informed and believe, several hundred cords of said cord-wood, of the value of dollars, and I further say, that the said wood and timber so cut and corded is not required for the necessary reparation of any fences, buildings, or erections which were upon said premises at the time of the said sale, nor for the necessary firewood for the use of the family of the said; but, to the contrary thereof, I am informed, and believe that the said defendant has made preparations to destroy the remaining wood and timber growing upon said premises, and continues daily to cut the same; and I am also informed and believe that the said defendant, together with one C. D., and others whose names are unknown to me, and to whom the said defendant has contracted or proposed to dispose of said wood, or a portion thereof, threaten to, and are actually proceeding, with their boatmen, cartmen, servants, and persons in their employ, to take and remove and dispose of the said cord-wood, wood, and timber. I further say that the land so purchased by me is valuable principally for the sake of said wood and timber, and, that the destruction thereof, as aforesaid, is a permanent injury to the freehold. And the said defendants, after the removal of said wood, as I am informed and verily believe, intend to abandon said land when the said wood is so removed, and by such removal of said wood the security for the amount yet due me on the purchase of said land will be lost and rendered of no value.

III. The defendant is wholly insolvent, and unable to answer the plaintiff in damages in the premises; and, as I verily believe, I will be left without remedy as to the timber already cut unless the defendant is enjoined from removing or interfering with it.

115. Affidavit should State.—The affidavit should allege that the injury will be irreparable; it must be shown to the Court how and why it would be so, otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right. (*Waldron v. Marsh*, 5 *Cal.* 119.) On a motion for injunction to enjoin waste, the complainant cannot, on bill and answer, read affidavits in support of his title. *United States v. Parrott*, 1 *McAll.* 271.

No. 940.

Statement on Motion Enjoining Waste.

From pulling down or otherwise injuring the buildings standing on the premises hereinafter described, or any part thereof, or from committing any waste, spoil, or destruction upon the said premises, and removing the fences therefrom, or destroying or cutting down the timber thereon, and from executing and procuring to be executed any conveyance of the said premises to any person or persons other than to the plaintiff, or as he shall direct.

The said premises are known as, and are bounded and described as follows: [*description.*]

116. Removal of Building.—An injunction will not be granted at the suit of the landlord to restrain the tenant from removing from the demised premises a building erected by him, if it appears that the security for the rent will thereby be merely impaired and lessened in value. It must appear that such security will be left inadequate to secure the rent. *Perrine v. Marsden*, 34 *Cal.* 14.

*No. 941.**Against Waste by Cutting Timber.*

From cutting down, felling, barking, or otherwise wasting or injuring any timber-trees, or from felling, digging up, or removing any ornamental trees therein, or underwood standing and growing on [*designate the premises*], and from committing any further or other waste or spoil in or upon the said land and premises.

117. Timber Already Cut.—In an action for waste in cutting timber, it may be questionable whether injunction is proper as to timber already cut, but the Court may require the defendant (having granted jurisdiction), to give security to account, as a condition of modifying the injunction in this respect. *Weatherly v. Wood*, 29 *How. Pr.* 404.

118. When Issued.—Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the Court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Hicks v. Michael*, 15 *Cal.* 107.

*No. 942.**Against Destroying Ornamental Trees.*

From committing waste, spoil, or destruction on [*designate the premises*], and from cutting down any timber or other trees growing upon the said estates, which are planted or growing there for the ornament of the said

house, or which grow in lines, walks, vistas, or otherwise for the ornament of said houses, or of the gardens, parks, or pleasure grounds thereunto belonging; and, also, to restrain him, his servants, workmen, and agents, from cutting down any timber or other trees, and from changing or removing the walks or drives therein, or widening or moving the same.

119. Injury Irreparable.—Plaintiff takes up two hundred and twelve acres of land under the Possessory Act of this State, incloses it, and plants it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery, and threaten to continue such trespasses—claiming the right so to do by paying to plaintiff the money value of the trees, etc. Plaintiff sued for damages for the trespasses committed, and asks a perpetual injunction against future trespasses. Verdict: “We, the jury, award the plaintiff forty-two dollars damages.” Judgment accordingly, the Court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit. *Held*, that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespasses should issue; that the nature of the property destroyed, and threatened to be destroyed, is such that the injury is irreparable; that plaintiff is not bound to take the mere money value of the trees, as they may possess a peculiar value to him. *Daubenspeck v. Gear*, 18 Cal. 443.

No. 943.

Against Working a Mine.

From working the ledges, veins, spurs, angles or seams of gold, silver, copper or iron, and other minerals lying in, upon, or under the [*designate lands*], and from digging, getting, and carrying away or selling or disposing of the gold, silver, copper, iron, and other minerals produced therefrom, or from mining any quartz or other rock which contains the same.

120. Mining Claim.—When the title to a mining claim is in controversy, an injunction may be granted to preserve the property pending the litigation. *Hess v. Winder*, 34 *Cal.* 270.

No. 944.

Order to Show Cause why Injunction should not be Granted.

[TITLE.]

To, defendant:

On the annexed affidavit let the defendant show cause before me, at, on the day of, 18 . . ., why an injunction should not be granted, restraining him from [*state acts to be enjoined*], and for such other or further relief as may be just. It is further ordered that said defendant, his agents and servants, be, in the mean time, restrained, and be hereby forbidden to suffer or commit any of said acts, until the further order of the Court.

J. C.

[DATE.]

Judge of Court.

121. Appeal from Order.—An appeal from an order refusing to grant an injunction upon such hearing, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal. (*Hicks v. Michael*, 15 *Cal.* 107.) An injunction is not dissolved or superseded by appeal taken. (*Merced Min. Co. v. Fremont*, 7 *Cal.* 130.) So, a pendency of motion for new trial does not operate as a suspension of an injunction. *Ortman v. Dixon*, 9 *Cal.* 23. -

122. Bonds Given.—The usual bond being given, an order was made to show cause (Aug. 29th) why an injunction should not issue. A restraining order, in the "mean time," issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied, and suit dismissed. Action on the bond: *Held*, that the restraining order embraces the time between its issuance and the hear-

ing, and the damages may be had beyond August 29th. (*Prader v. Purkett*, 13 *Cal.* 588.) Even if a chancellor has no power, under the one hundred and sixteenth section of the Practice Act, to require an undertaking upon the issuance of the restraining order, still, having taken jurisdiction of the general subject of litigation, he has power, aside from the Statute, to order such undertaking, or to make any other order in the progress of the case for the furtherance of the objects of the litigation and the protection of its subject matter. *Prader v. Purkett*, 13 *Cal.* 588.

123. Hearing.—If the Court or Judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained. *Cal. Pr. Act*, § 116; *N.Y. Code*, § 223.

124. Order to Show Cause.—The object of the practice of issuing an order to show cause before granting the injunction is to enable the parties to present the case on the merits. *Hicks v. Michael*, 15 *Cal.* 107.

125. Order Refused.—Where, under the one hundred and sixteenth section of the Practice Act, an order is made to show cause why an injunction should not be granted, and restraining defendants until the hearing, and on the hearing upon the order the injunction is refused, the restraining order expired by limitation. *Hicks v. Michael*, 15 *Cal.* 107.

No. 945.

Preliminary Injunction, with Order to Show Cause why it should not Continue.

[TITLE.]

On the sworn complaint in the above-entitled action, and on the affidavit of A. B. therein, a motion being made by E. F., of counsel for the plaintiff, for a preliminary injunction against the defendant, and sufficient reason appearing why the same should be granted:

IT IS HEREBY ORDERED that, until the further order of this court [*state acts to be enjoined*].

And on the complaint in this action, and said affidavit of A. B., let the defendant or his attorney show cause before this court, on the day of instant, at o'clock A.M. on that day, at the City Hall in the City of San Francisco, why the foregoing order should not be continued in full force, and until the final judgment and decree in this suit; and until the foregoing order is modified, let the same be in full force and effect.

I. C.,

[DATE.]

Judge of Court.

126. Order Continued.—In the following case, it was held that the temporary injunction granted on filing the complaint should not have been dissolved before the hearing; that on the facts stated in the complaint, an action for damages would be fruitless; that, although the complaint does not aver absolute insolvency of defendants, still enough is averred to satisfy the Court that a judgment for damages would be worthless, and hence the injunction ought to have been continued. *Hicks v. Compton*, 18 Cal. 206.

No. 946.

Injunction-Order after Order to Show Cause.

[TITLE.]

On the return of the order to show cause made by me in the above entitled action, on the day of, 18 . . . , and returnable this day, after hearing E. F. for the plaintiff, and G. H. for the defendant, no sufficient cause to the contrary being shown:

IT IS ORDERED, that the said order to show cause be, and the same hereby is, made absolute, on the said

plaintiff executing and filing a written undertaking pursuant to the Statute and the practice of the Court, to the effect that he will pay the said defendant such damages, not exceeding the sum of dollars, as he may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff is not entitled thereto. And I order that the said defendant, and his agents and servants, be enjoined and restrained [*state acts to be enjoined*] until the further order of the Court.

[DATE.]

[SIGNATURE.]

127. Note.—It will be readily observed by the practitioner that the language of each restraining order is necessarily changed according to the facts of each case, and the object being to inform the party against whom the order runs, in clear and unmistakable terms, what he is forbidden from doing, the briefer the order the clearer it will be; lengthy and wordy injunction orders should be avoided.

128. Insufficient Grounds.—Bill for an injunction to restrain defendants from taking possession of certain real estate, a warehouse and wharf. Complaint avers plaintiff's title to the property, and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises; and that unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed. *Held*, that these allegations are insufficient to authorize an injunction, there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law. (*Tomlinson v. Rubio*, 16 Cal. 202.) The answer in chancery of a corporated body under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted. (*Haight v. Proprietors of the Morris Aqueduct*, 4 Wash. C. Ct. 601.) A mere denial in the answer of the equity of the bill will not prevent the Court from looking into the law and the facts of the

case on a motion for a special injunction, and granting or refusing it according to its discretion. *Cleun v. Brewer*, 2 *Curt. C. Ct.* 506.

No. 947.

Order Restraining Waste.

[TITLE.]

On the annexed affidavit of A. B., and on motion of E. F. his counsel:

IT IS ORDERED, that the defendant be restrained and prohibited from [*here insert statement in motion*], and from committing any further waste upon the premises therein described.

[SIGNATURE OF JUDGE.]

[DATE.]

No. 948.

Injunction by the Court.

[TITLE.]

The people of the State of California,
To, send greeting:

The above-named plaintiff having filed his complaint in the District Court of the Judicial District, against the above-named defendants, praying for an injunction against said defendants, requiring them to refrain from certain acts in said complaint and hereinafter more particularly mentioned: On reading the said complaint in this action, duly verified by A. B., and it satisfactorily appearing to the Judge of our said Court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given:

We therefore, in consideration thereof, and of the particular matters in said complaint set forth, do strictly command you, and each of you, your and each of your servants, agents, attorneys, employés, and all persons acting under the control, authority, or direction of you or either of you, from [*insert matter prohibited*].

WITNESS, Hon., Judge of the
Judicial District, at the Court House in the
County of, and the seal of the said Court,
this day of, 18...

.,

Clerk,

.,

Deputy Clerk.

[SEAL OF COURT.]

129. Form.—No particular form of order to restrain is necessary. The substantial thing is an authentic notification to the defendants of the mandate of the Judge, which they must then, at their peril, obey. (*Summers v. Farish*, 10 *Cal.* 347.) The language should be so clear and explicit that an unlearned man can understand it, without employing counsel to advise him what he has a right to do. (*Lawrie v. Lawrie*, 9 *Paige*, 234; *Clark v. Clark*, 25 *Barb.* 76.) And should contain sufficient to apprise the party what he is restrained from doing, though how far actual knowledge of its purpose on the part of the defendant may affect this, see *Sullivan v. Judah*, 4 *Paige*, 444; *Byrne v. Stevens*, 4 *Edw.* 119.

130. Penalty.—According to the practice of the third circuit no money penalty is inserted in an injunction. *Low v. Haul*, 1 *Wall. jr. C. Ct.*, 345.

131. Title to Property.—There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction when the averment of his right in the complaint is admitted by demurrer. *Tuolumne Water Co. v. Chapman*, 8 *Cal.* 392.

132. To whom Directed.—Though an injunction should not in general be directed to persons not parties in the action (*Iveson v.*

Harris, 7 *Ves.* 257; *Fellows v. Fellows*, 4 *Johns. Ch.* 25; *Chase v. Chase*, 1 *Paige*, 198; *Watson v. Fuller*, 9 *How. Pr.* 425; *People v. N.Y. Common Pleas*, 3 *Abb. Pr.* 181; *Bloomfield v. Snowden*, 2 *Paige*, 355; *Sage v. Quay*, *Clarke*, 347; *Edmonston v. McLoud*, 19 *Barb.* 361), yet the defendant cannot object to it on this ground. (*Tradesman's Bk. v. Merritt*, 1 *Paige*, 304; *Fellows v. Fellows*, 4 *Johns. Ch.* 25.) But it is usual and proper to express that the agents, attorneys and servants of the defendants are enjoined; whether they are named or not, they are bound by it, if they have notice of it. (*Mayor of N.Y. v. Conover*, 5 *Abb. Pr.* 252.) It seems in New York the Court will not enforce obedience on such an injunction on an *ex parte* application for an attachment. (*Watson v. Fuller*, 9 *How. Pr.* 426.) And an injunction against persons not parties is operative only as a notice to such. *Sage v. Quay*, *Clarke*, 348; *Edmonston v. McLoud*, 19 *Barb.* 361.

133. When may be Granted.—Granting and continuing injunctions rests very much in the sound discretion of the Court, to be governed by the nature of the case. (*Hicks v. Michael*, 15 *Cal.* 107.) And this discretion should always be exercised in favor of the party most liable to be injured. (*Hicks v. Compton*, 18 *Cal.* 206.) The abuse of discretion in granting the writ of injunction should be guarded against. (*De Witt v. Hays*, 2 *Cal.* 463.) An order or writ may be granted by the Court in which the action is brought, or by a judge thereof, or by a county judge; and when made by a judge, may be enforced as the order of the Court. *Cal. Pr. Act*, § 111; *N.Y. Code*, § 218.

No. 949.

Order of Injunction—By the Judge.

[TITLE.]

To C. D.:

I. The above named plaintiff having commenced an action in the District Court of the Judicial District of the State of, in and for the County of, against the above named defendant, and having prayed for an injunction against the said defendant, requiring him to refrain from certain acts, in said

complaint and hereinafter more particularly mentioned: On reading the said complaint in said action, duly verified by the oath of said plaintiff, and it satisfactorily appearing to me therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given:

II. It is therefore ordered by me, the Judge of said District Court of the Judicial District, that until further order in the premises, you, the said C.D., and all your counselors, attorneys, solicitors, and agents, and all others acting in aid or assistance of you, and each and every one of you, do absolutely desist and refrain from [*insert the matter prohibited*].

[DATE.]

J. C.,
Judge.

No. 950.

Injunction—By a Judge out of Court.

To, defendant:

For the causes stated in the annexed complaint and affidavits, you are commanded to refrain from [*state matter prohibited*], until the further order of the Court.

[DATE.]

J. C.,
Judge of the Court.

SERVICE OF INJUNCTION.

133. When granted on the complaint, a copy of the complaint and verification attached shall be served with the injunction. (*Cal. Pr. Act*, § 113.) The Statute

points out no mode for service of an injunction; but in conformity with the provisions relative to the summons, delivery of a copy is essential to personal service where that is required; but whether it would be necessary to exhibit the original, unless specially requested by the party served, no opinion is here expressed. (*Edmond v. Mason*, 16 *Cal.* 386.) When granted upon affidavit, a copy of the affidavit shall be served with the injunction. *Cal. Pr. Act*, § 113.

134. A writ placed in the Sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. (*Whitney v. Butterfield*, 13 *Cal.* 335.) A party against whom an injunction has been issued is not bound to obey it until after due service thereof on him; giving him *verbal* notice that an order enjoining him has been made is not sufficient. (*Elliott v. Osborn*, 1 *Cal.* 396.) It seems, if a party be in court at the time an injunction order is made, and thus has personal knowledge of the order, that he would be bound thereby. (*Id.*) An injunction order, and due service thereof on the party enjoined, do not operate to enlarge the time within which an act is required to be done by the party procuring the order. (*Id.*) Where the plaintiff in an injunction suit endeavored to entrap the defendant into a violation of the injunction: *Held*, that the plaintiff should be charged with the costs of an application for an attachment made by him. *Sparkman v. Higgins*, 2 *Blatch.* 29.

135. **Contempt.**—An attachment for disobeying an injunction may be granted. (*Munroe v. Harkness*, 1 *Cranch C. Ct.* 157.) The Court may imprison for a contempt in violating an injunction. *Monroe v. Bradley*, 1 *Cranch C. Ct.* 158; see *Cal. Pr. Act*, § 482.

DISSOLVING INJUNCTION.

*No. 951.**Notice of Motion to Dissolve.*

[TITLE.]

To:

Please take notice, that on [*designate papers*]; the undersigned will move the Court, at, on the day of, 18..., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the injunction issued in this action be dissolved; and for such other or further relief as may be just.

[DATE.]

[SIGNATURE.]

135. Damages on Dissolution.—Defendant may recover damages though the court had no jurisdiction. (*Cumberland Coal Co. v. Hoffman Steam Coal Co.*, 39 *Barb.* 16; S.C., 15 *Abb. Pr.* 78.) And the measure of damages is the value of the property. (*Barton v. Fisk*, 30 *N.P.* 166.) Fees of counsel should not be included. (*Ah Shaie v. Quan Han*, 3 *Cal.* 216; *Tracks v. Schmidt*, 18 *Abb. Pr.* 307.) The fees of an attorney employed to resist injunction cannot be recovered as damages, unless they have been paid. The fact that the plaintiff is subject to a liability to his attorney, without showing actual payment to him, is insufficient. (*Wilson v. McEvoy*, 25 *Cal.* 170.) The plaintiff in an action on an injunction bond is not entitled to a judgment for damages for expenses incurred for attorneys' fees and in procuring testimony, unless he proves that he has actually paid the attorney and the expenses of procuring testimony. (*Prader v. Grim*, 28 *Cal.* 11.) The usual bond being given, an order was made to show cause (Aug. 29) why an injunction should not issue. A restraining order, in the "mean time," was issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied, and suit dismissed. Action on the bond. *Held*, that the restraining order embraces

the time between its issuance and the hearing, and that damages may be had beyond August 29th. *Prader v. Grim*, 13 *Cal.* 585.

136. Defense in Action on Bond.—In an action for damages on an undertaking given on suing out an injunction, the defendants cannot object, by way of defense, that they ought not to pay the damages which they contracted to pay, because the business which they enjoined, and for the stoppage of which damages are claimed, was a public nuisance. *Cunningham v. Breed*, 3 *Cal.* 384.

137. Dismissal of Suit.—A judgment dismissing a suit, in which a temporary injunction had been granted for want of prosecution, amounts to a determination by the Court that the injunction was improperly granted; and after such judgment suit lies upon the injunction bond. (*Dowling v. Polack*, 18 *Cal.* 625.) Where an injunction is dissolved, and the suit in which it issued is dismissed by the action of the party, this is no admission that the injunction was improperly sued out. In such case, to maintain an action on the bond, it must be shown that there was no proper cause for the injunction. *Galson v. White-side*, 3 *Cal.* 309.

138. Effect of Answer.—Upon a motion to dissolve an injunction, an averment in an answer not responsive to any allegation in the bill is not *per se* evidence against the complainant. The answer of the defendant, in order to be evidence in his favor, must respond to a fact averred in the bill, and not to a mere inference of law. (17 *Johns.* 366; 1 *Wash. C. Ct.* 225; *Id.* 389; 1 *Call.* 286, 394; 3 *Id.* 44; 1 *Mun.* 373; 2 *Id.* 298; 2 *Wheat.* 383; 2 *Johns. Ch.* 287; 1 *Har. & G.* 28; *Robinson v. Cathcart*, 2 *Cranch C. Ct.* 590; *United States v. Parrott*, 1 *Mc-All.* 271.) If an answer denies the equities, it will be dissolved; (*Hagard v. Hudson Riv. Bridge Co.*, 27 *How. Pr.* 296;) but without prejudice. (*Id.*) But it does not follow necessarily that the injunction should be dissolved in such case. *Carpenter v. Danforth*, 19 *Abb. Pr.* 225.

139. Effect of Appeal.—An injunction is not dissolved or suspended by appeal taken. (*Merced Mining Co. v. Fremont*, 7 *Cal.* 130.) So, an appeal from an order dissolving an injunction does not prolong the restraining order. *Hicks v. Michael*, 15 *Cal.* 107.

140. Effect of Dissolution.—The dissolution of an injunction is a technical breach of the injunction bond. (*Stone v. Cason*, 1 *Or.*

100.) Where an injunction has been dissolved, and afterward reinstated, and is still pending, no suit can be maintained on the injunction bond, as for a breach of it. *Bentley v. Joslin, Hempst.* 218.

141. Grounds of Notice.—If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it shall be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it shall be modified. (*Cal. Pr. Act*, § 119.) An injunction was dissolved on the grounds: *First*, That the affidavit and papers on which it was granted were not legibly written; *Second*, That the injunction had not been served personally; *Third*, That the papers had not been filed. (*Johnson v. Casey*, 28 *How. Pr.* 492.) The grounds of the injunction cannot be inquired into in suit upon an injunction bond. The court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued; and after such determination, and not before, does an action lie on the bond. *Dowling v. Polack*, 18 *Cal.* 625.

142. Injunction Granted without Notice.—If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. (*Cal. Pr. Act*, § 118; *N.Y. Code*, § 225.) The motion may be made: *First*, Upon the complaint and affidavits, or, in other words, the papers, whatever they may have been, upon which the injunction was granted; or, *Second*, Upon the papers upon which the injunction was granted, and affidavits on the part of defendant, with or without answer. If the defendant rests his motion upon the papers upon which the injunction is granted, the plaintiff can make no further showing, but must stand upon his complaint, or his complaint and affidavits, as the case may be. If, however, the defendant makes a counter showing by affidavit, with or without the answer, the plaintiff may meet it with a further showing on his part. If the defendant moves upon what he has prepared as his verified answer, he makes it an affidavit, in the sense of the Statute, for all the purposes of his motion, and he cannot deprive the plaintiff of his rights to reply by calling it an answer instead of an affidavit. (*Falkinburgh v. Lucy*, 35 *Cal.* 52.) It is no ground for dissolving an injunction upon a motion made upon the complaint alone, if the facts alleged in the complaint are sufficient to entitle the plaintiff to an injunction. *Fuhn v. Webber*, *Cal. Sup. Ct., Oct. T.*, 1869.

143. Judgment, Effect of.—When suit is brought to set aside a judgment on the ground of fraud, and a restraining order is issued in such suit at the instance of the plaintiff, and subsequently, at a final hearing, the Court decides that such judgment was not fraudulent, but valid: *Held*, that the effect of such judgment is that plaintiff was not entitled to the restraining order. (*Hayman v. Landers*, 12 *Cal.* 107.) Plaintiffs sue defendants for damages for their alleged trespasses upon a certain portion of quartz mining claims, alleged in the complaint to be the property and in the possession of plaintiffs, asking an injunction against further trespasses, which was granted, the complaint averring the insolvency of defendants. The defendants deny all the allegations of the complaint, and claim ownership. The jury found, generally, for defendants, then moved to amend the judgment by adding thereto the words, "and that the injunction heretofore granted be, and the same is hereby dissolved," which was refused; but the judgment was so modified as to permit defendants to work the surface diggings set up in their answer. *Held*, that the action amounted to an action of trespass, with an injunction as auxiliary thereto; and that the action itself having failed by the verdict for defendants, the injunction falls with it, and should have been dissolved. *Brennan v. Gaston*, 17 *Cal.* 372.

144. Motion on Complaint and Answer.—Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases. (*Gardiner v. Perkins*, 9 *Cal.* 553; *Johnson v. Wide West M. Co.*, 22 *Cal.* 479; *Burnett v. Whitesides*, 13 *Cal.* 156; *Real del Monte Co. v. Pond Co.*, 23 *Cal.* 82.) Where an injunction was granted on the complaint, restraining defendants from surveying or selling the premises pending suit, it was dissolved on filing an answer setting up paramount title in defendants. *Held*, that the injunction was properly dissolved, because the validity of defendants' title should be judicially determined before its assertion be enjoined. *Curtis v. Sutter*, 15 *Cal.* 263.

145. Motion, where to be Made.—The court in which the objectionable order or decree exists is the one to apply to for relief. *Chipman v. Hibbard*, 8 *Cal.* 268; *Woodruff v. Fisher*, 17 *Barb.* 224; *Bank of Commerce v. Rutland and Washington Railroad Company*, 10 *How. Pr.* 1.

146. Notice.—Notice of a motion to dissolve an injunction must be given in a reasonable time before the motion is made, unless the cause has been set down for hearing on the motion. (*Wilkins v. Jordan*, 3 *Wash. C. Ct.* 226.) What notice is required, see (*Burford v. Ringgold*, 1 *Cranch C. Ct.* 253; *Ramsay v. Wilson*, *Id.* 304; *Stoddard v. Waters*, *Id.* 483.) Under ordinary circumstances, one day's notice is too brief; but there is no fixed limit as to time. *Lawrence v. Bowman*, 1 *McAll.* 419.

147. New Trial, Effect of.—Pendency of motion for a new trial does not operate as a suspension to an injunction. (*Ortman v. Dixon*, 9 *Cal.* 23.) In an action to try the right to a mining claim, a preliminary injunction is granted on plaintiff's motion, and, on appeal to the Supreme Court, a judgment in favor of plaintiff is reversed, and a new trial granted: this granting of a new trial does not entitle the defendant to a dissolution or modification of the injunction. *Hess v. Winder*, 34 *Cal.* 270.

148. Reinstating.—Where an injunction has been dissolved on the coming in of the answer denying the equity of the bill, and testimony has afterwards been taken and published tending to show the right of the complainant to relief, the injunction or application may be reinstated. (4 *Johns. Ch.* 36; 2 *Ves. Sr.* 19; 1 *Hen. & M.* 8; 1 *Bland.* 568; *Tucker v. Carpenter*, *Hempst.* 440.) When a judgment is reversed and the cause remanded for a new trial, it is returned to the lower court for a trial upon the issues, and it stands in the same attitude in all respects as before the former trial. If the plaintiffs were entitled to an injunction before the former trial, and the injunction was ordered, they were entitled to retain it upon the cause being remanded for a new trial. *Hess v. Winder*, 34 *Cal.* 270.

149. Nonsuit, Effect of.—When a preliminary injunction is granted on plaintiff's application, the injunction should be dissolved if a nonsuit is granted on the trial. (*Harris v. McGregor*, 29 *Cal.* 124.) If a preliminary injunction is dissolved upon granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, upon a proper application, will be entitled to a renewal of the injunction upon filing the *remittitur* in the Court below. *Harris v. McGregor*, 29 *Cal.* 124.

150. Opposing Motion.—If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff

may oppose the same by affidavits, or other evidence, in addition to those on which the injunction was granted. (*Cal. Pr. Act*, § 118; *N.Y. Code*, § 225.) On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Hicks v. Michael*, 15 *Cal.* 107.

151. Order made *Ex Parte*.—Section three hundred and thirty-four of the Practice Act provides that an order made out of court, without notice to the adverse party, may be vacated or modified without notice. The provision made in Section one hundred and eighteen, that if an injunction be granted without notice, the defendant, at any time before trial, may apply, upon reasonable notice, to dissolve or modify the same, is not a substitution for the power conferred by Section three hundred and thirty-four, but in addition to it. Where an order granting an injunction is made *ex parte*, the injunction may be dissolved without notice. (*Borland v. Thornton*, 12 *Cal.* 440.) An injunction may be dissolved on an *ex parte* application. (*Bruce v. Del. and Huds. Canal Co.*, 8 *How. Pr.* 440; *Peck v. Yorks*, 41 *Barb.* 547.) But notice must be given. *Id.*

152. Remedy of Defendant.—An injunction bond, though given to all the obligees by name, and using no words directly expressing a several obligation, yet necessarily creates a several liability, the design of it being to secure each or all of the obligees from damages or injury. (*Summers v. Farish*, 10 *Cal.* 347.) An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of court through malice, and without probable cause. (*Robinson v. Kellum*, 6 *Cal.* 399.) If the act complained of is destitute of these elements, the remedy of the injured party is on the injunction bond. (*Id.*) The Court may order a reference to ascertain the damages sustained by an injunction. *Russell v. Elliott*, 2 *Cal.* 245.

153. Reversal of Judgment.—A reversal of judgment, which judgment awards the plaintiff possession of a tract of land, and perpetually enjoins the defendant from committing waste on the land, also reverses the injunction decree, even if the decree is not included in the record sent to the appellate court. *McGarrahan v. Maxwell*, 28 *Cal.* 84.

154. Revival of Injunction.—The court below may, on

proper showing, revive an injunction once dissolved, or grant an injunction previously denied, and this is the extent of its power when the matter has been once disposed of. *Hicks v. Michael*, 15 *Cal.* 107; *Craner v. Nelson*, 23 *Cal.* 464.

155. Right to Move.—The right to move to dissolve an injunction before final hearing exists only where it was granted without notice, according to Section one hundred and eighteen of the Practice Act. (*Natoma Water and Mining Co. v. Parker*, 16 *Cal.* 83.) The privilege of moving for a dissolution of an injunction upon the filing of an answer is limited to cases where the injunction is originally granted without notice. (*Henshaw v. Clark* and one hundred and three Chinamen, 14 *Cal.* 460.) Where the injunction is granted on a rule to show cause, it cannot be dissolved until the final hearing, unless the right to apply for dissolution on filing the answer be expressly reserved. (*Id.*) An injunction granted upon an order to show cause, and after a full hearing on the merits, cannot be dissolved on motion before the final hearing. The only remedy is to appeal from the order granting the injunction. *Natoma Water and Mining Co. v. Parker*, 16 *Cal.* 83.

156. Street Assessment.—Where assessment was laid for the purpose of improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and the improvement was completed without the plaintiff interposing in the outset to prevent it, and he then filed an injunction bill to stay the sale of his land by virtue of an ordinance of the City, for the purpose of avoiding the payment of his portion of the assessment: *Held*, that the injunction ought to be dissolved, on the ground that he who asks equity must do equity; that the City should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessments, leaving him after the sale to the technical rights which he set up, by reason, as he claimed, of some irregularity in the mode of making the assessment. *Weber v. The City of San Francisco*, 1 *Cal.* 455, 119.

157. When Dissolved.—Where an injunction is granted until further answer and further order, which is the usual form, it is never dissolved until the answer comes in, even though the defendant should live abroad. (*Read v. Consequa*, 4 *Wash. C. Ct.* 174.) If there are several defendants, the Court will not in general dissolve the injunction until all have answered. (*Robinson v. Cathcart*, 2 *Cranch C. Ct.* 590.) Where an injunction will be dissolved upon the coming in of an an-

swer denying positively the equities of the bill, see *Orr v. Merrill*, 1 *Woodb. & M.* 176. *Orr v. Littlefield*, *Id.* 13; *S.C.*, 8 *Law Rep.* 314; *United States v. Parrott*, 1 *McAll.* 271.

No. 952.

Order Dissolving Injunction.

[TITLE.]

On reading and filing the answer of the defendant, and on motion of G. H., counsel for the defendant, and after hearing E. F., counsel for plaintiff, in opposition:

IT IS ORDERED, that the injunction granted on the day of, 18.., against the above-named C. D., be vacated and dissolved.

J. C.

Judge of County.

No. 953.

Order Confirming Report as to Damages.

[TITLE.]

On reading and filing the annexed notice of motion and affidavit and certificate, and the referee's report, and the evidence on which the same was founded, and on motion of G. H. for the defendants, and after hearing E. F. for plaintiffs, and for L. M. and N. O. (sureties) in opposition:

IT IS ORDERED, that the said report of the referee herein be, and the same is hereby, in all respects, confirmed, with dollars of costs of this motion.

*No. 954.**Injunction Dissolved and Action Dismissed.*

[TITLE.]

And now comes as well the said plaintiff (by his attorney) as the said defendant (by his attorney), and thereupon this action came on for trial before the Court upon the issues joined between the parties, on consideration whereof the Court does find that the said defendant [*here state the finding of the Court on the issues presented in the pleadings*] was not guilty of the waste and destruction in manner and form as the said plaintiff hath in his said complaint declared against him, or in any manner, or at all. It is therefore considered that the injunction heretofore granted in this action be, and the same is hereby dissolved; and it is further considered that the said defendant recover against the said plaintiff his costs in and about his suit, in this behalf expended, taxed to be dollars.

NOTE.—This is one of the *old* forms, yet it contains all that is requisite.

*No. 955.**Injunction Made Perpetual.*

[TITLE.]

And now comes as well the said plaintiff (by his attorney) as the said defendant (by his attorney), and thereupon this action came on for trial before the Court, upon the issues joined between the parties; on consideration whereof, the Court do find that the said defend-

ant was guilty of the waste and destruction, in manner and form as the said plaintiff hath in his said complaint alleged against him.

It is therefore ordered and adjudged that the injunction heretofore granted in this action be, and the same is hereby made perpetual, and the said defendant is hereby perpetually enjoined from [*here state the act or acts complained of, with particularity, and from the doing of which the defendant is to be enjoined*]; and it is further considered that the said plaintiff recover against the said defendant his costs in and about his suit, in this behalf expended taxed to be dollars.

SUBDIVISION SEVENTH.

Proceedings Collateral and Incidental to Actions.

CHAPTER I.

NOTICES OF MOTION, AFFIDAVITS AND ORDERS IN GENERAL.

MOTIONS AND NOTICES.

1. It is prescribed by the Statute of California that "every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order," and that "our application for an order is a motion." (*Cal. Pr. Act*, § 515.) In practice, a motion is an oral argument to the Court, showing why a certain order should be made; while a notice is a written information given to the opposite party, that at a certain *time* and *place* the party giving the same will move the Court for a certain order, stating what. It is also necessary for the moving party to state in such notice upon *what the motion will be founded*, as upon affidavits, papers on file, etc. It is also provided by our Statute, that motions shall be made in the county in which the action is brought or in an adjoining county within the same district. (*Cal. Pr. Act*, § 516.) Thus, the practitioner may readily know *where* the motion *must* be made. The title of the action must also be *correctly* given, with the *date* and *hour* of the day when it will be made, and the *particu-*

lar place—*e.g.*, the City Hall, Court House, etc. The true practice is to be very specific in all questions of *time*, *place* and *object* of the motion.

2. There are certain motions which are termed *contested* motions, and certain others termed *ex parte* motions. The former always require previous notice, the latter never; and when notice is required, it must be given in writing *five days* before the hearing. (*Cal. Pr. Act*, § 517.) This is the statutory rule, but the Court, in the exercise of a sound discretion, may extend or even shorten the time. These are questions which arise in the course of the action, and only relate to the practice, and, so far as allowable by the Statute, are generally regulated by the rules of each particular court, a full knowledge of which is too frequently not regarded by the profession as essential.

3. The question of service of notices, where important rights are to be affected, must be carefully considered. The Statute must be strictly followed to insure due and legal service, as nothing will be left to implication. Unless the Statute be strictly followed, the Court will not have acquired jurisdiction to make the order asked for, and the entire proceedings will be illegal. Frequently notice is waived by stipulation of attorneys not in writing. This may be sufficient among honorable practitioners, but it is not the true practice, as it sometimes fails of its object, whereas, if the directions of the Statute be strictly followed, no misunderstanding can arise.

*No. 956.**Form of Notice.*

[TITLE.]

To, attorney for:

Please take notice that I will move this honorable Court, at the court room, in the City Hall, on the day of, 18.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order [*state the substance of motion*], and for such other and further order as may be just.

[SIGNATURE.]

[DATE.]

Attorney for

1. Appearance.—Service of notice of appearance must antedate or become contemporaneous with the service of all other notices and papers. *Steinback v. Leese*, 27 *Cal.* 297.

2. Computation of Time.—The time within which an act is to be done, as provided in this Act, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded. When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, or the preparation of statements, or of bills of exceptions, or of amendments thereto, the time allowed by this Act may be extended, upon good cause shown by the court in which the action is pending, or the Judge thereof, or, in the absence of such Judge from the County in which the claim is pending, by the County Judge; but such extension shall not exceed thirty days beyond the time prescribed by this Act, without the consent of the adverse party. *Cal. Pr. Act*, § 530; *N.Y. Code*, § 407.

3. Consolidation of Actions.—Whenever two or more actions are pending at one time, between the same parties and in the same court, upon causes of action which might have been joined, the Court may order the actions to be consolidated into one. (*Cal. Pr. Act*, § 526; *Wallace v. Eldridge* (No. 2), 27 *Cal.* 498; *N.Y. Code*, 355.)

The Supreme Court will not consolidate suits brought upon distinct causes of action. *Wallace v. Eldridge* (No. 2), 27 *Cal.* 498; 4 *Hill*, 46.

4. Construction.—If there is any ambiguity in the terms of a notice, rendering its meaning doubtful, the construction must be most strongly against the party giving the notice. *Carpenter v. Thurston*, 30 *Cal.* 123.

5. Discretion.—The Court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law for filing papers in a cause. (*Wood v. Forbes*, 5 *Cal.* 62.) All the proceedings in a case are supposed to be within the control of the Court, while they are in paper, and before a jury is sworn, or judgment given. Therefore orders may be revised, and such as in the judgment of the Court may have been irregular or improperly made may be set aside. (*Breedlow v. Nicolas*, 7 *Pet.* 413.) Summary relief on motion is now usually granted, instead of putting the party to an *audita querela*. (*Humphreys v. Leggett*, 9 *How. Pr.* 20 S. 297.) A question whether a party had a right to proceed summarily on motion to vacate a decree in the Circuit Court, is merely one of practice, to be governed by the rules prescribed by the Supreme Court, and the established principle and usage of a court of chancery. *Wiggin v. Gray*, 24 *How. U.S.* 303.

6. Due Notice.—Due notice cannot be defined. Circumstances must control each case. (*Lawrence v. Bowman*, 1 *McAll.* 419.) Notice to an agent is notice to the principal; (*Bowman v. Wathen*,) and notice to a deputy marshal is equivalent to notice to the marshal himself. *United States v. Bank of Arkansas*, *Hempst.* 460.

7. Notice Essential.—Special motions, unlike those granted of course, require allowance by the Judge, and previous notice to the adverse party. (*United States v. Parrott*, 1 *McAll.* 447.) Upon application by counsel by the plaintiff, a day was assigned to argue the question of the jurisdiction of the Court to proceed in the cause, upon the condition that notice should be given to the defendant, to enable him to employ counsel in the interim, as the Court would not feel bound by its decision in an *ex parte* argument if the defendant should desire to have the question again argued. (*New Jersey v. New York*, 3 *Pet.* 461.) Previous notice of a motion for the appointment of a receiver is unnecessary when the parties to be affected are in court by counsel. (*McLean v. Lafayette Bank*, 3 *McLean*, 503; S.C., 2 *West. Law J.* 441.) A motion to produce a paper in the possession of the plaintiff, which is

necessary to enable the plaintiff to plead, may be granted, in the discretion of the Court, although no notice has been given; otherwise, when possession of a paper is desired to be used in evidence. (*Bronson v. Kenney*, 3 *McLean*, 180.) The above references are more especially applicable to the practice in the United States courts. It is prescribed by the State of California, that, after appearance, a defendant or his attorney shall be entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail. *Cal. Pr. Act*, § 523.

10. Notice must be in Writing.—When the Statute speaks of notice of motion, it means written notice, or notice in open court, of which a minute is made by the Clerk. *Borland v. Thornton*, 12 *Cal.* 440.

11. Notice to Attorney.—It is the duty of an attorney to communicate to his client whatever information he acquires in relation to the subject matter of the suit, and he will be presumed to have performed his duty, and notice to him is constructive notice to his client. (*Bierce v. Red Bluff Hotel Company*, 31 *Cal.* 160.) Where a party changes his attorney in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record. *Grant v. White*, 6 *Cal.* 55.

12. Order of Court—Entry Nunc pro Tunc.—A court has no power, after the adjournment of the term, to direct the Clerk to enter in the minutes, *nunc pro tunc*, an order made at the adjourned term, when there is nothing in the record to show that such order was made. *Hegeler v. Henckell*, 27 *Cal.* 491.

13. Order Defined.—Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. (*Cal. Pr. Act*, § 515; *N.Y. Code*, § 400; *Jenkins v. Frink*, 27 *Cal.* 399.) As to what constitutes an order, see (*Loring v. Illsley*, 1 *Cal.* 27; and *Belt v. Davis*, *Id.* 136.) It may be defined to be the judgment or conclusion of the Court upon any motion or proceeding. It means cases where a court or judge grants affirmative relief, and cases where relief is denied. (*Gilman v. Contra Costa County*, 8 *Cal.* 57.) The effect of an order of Court, general in its terms at the close, is to be ascertained by a reference to the motion upon which it was

made, and which is recited at its commencement. *McKinley v. Tuttle*, 34 *Cal.* 235.

14. Order, when Granted.—Motion for any rule or order is not allowed when the Court is equally divided. If an affirmative decision be indispensable, the case stops, and the parties go out of Court; otherwise the case stands as if no motion had been made. (*Goddard v. Coffin*, *Davies*, 381.) A motion made at one term not being decided nor continued, the Court will order a continuance, *nunc pro tunc*, and the defendant will not be required to take up the cause on the ground of irregular continuance. *Hurd v. Williams*, 4 *McLean*, 239.

15. Order in Insolvent Proceedings.—An order of the County Judge in insolvent proceedings, made under Sections five and eight of the Insolvent Act, which directs the Clerk to issue an "order for the creditors to appear * * * and show cause why the insolvent should not be discharged from his debts, in pursuance of the insolvent laws, and likewise make an assignment of his estate for the benefit of his creditors," is a substantial compliance with said Act. (*Flint v. Wilson*, 36 *Cal.* 24.) But the State insolvent law is no longer in force, as the U.S. Bankrupt Act now takes the place of all State legislation on the subject.

16. Personal Services.—Personal service is made by delivery to the party or attorney on whom the service is required to be made. *Cal. Pr. Act*, § 520.

17. Relief.—Where a party, in his notice of motion served on the adverse party, asks for a specific relief, or for such other or further order as may be just, the Court may afford any relief compatible with the facts of the case presented. *The People v. Turner*, 1 *Cal.* 152.

18. Rule to Show Cause.—It has been held by the Supreme Court of the United States, that the rule to show cause empowers a party to explain his conduct, and furnishes a case by implication which makes it proper that the Supreme Court should know the reason for his decision. The rule ought not to be granted when the record does not show mistake, misconduct, or omission of duty on the part of the Court, unless a *prima facie* case be made out by affidavit. (*Postmaster-General v. Tugg*, 11 *Pet.* 173.) Malicious conduct of an officer in executing process cannot be reached by motion. (*Smith v. Miles*, *Hempst.* 34.) But when a sheriff, having received an execution on which

costs are due, fails to make them when practicable, he becomes responsible, and may be reached by motion. An order of the client or attorney cannot change this liability. *Lewis v. Hamilton, Hempst. 21.*

19. Service, how Made.—Service may be personal, or it may be: *First*, If upon an attorney, by leaving the notice or other papers with his clerk, or with a person having charge of his office, or by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; if the office be not open, then by leaving them at the attorney's residence with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the post office, directed to such attorney. *Second*, If upon a party, by leaving the notice or other papers at his residence between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be unknown, by putting the same, enclosed in an envelope, into the post office, directed to such party. (*Cal. Pr. Act, § 520.*) Written notices and other papers, when required to be served on the party or attorney, shall be served in the manner prescribed in Sections 520, 521 and 522 of the California Practice Act. (See § 519.) Reading an order of court to the party to be served is not a compliance with a statute which requires that such party shall have reasonable notice in writing of the order. (*Hart v. Gray, 3 Sumn. 339.*) That a notice cannot lawfully be served on Sunday, see *Chesapeake and Ohio Canal Co. v. Bradler, 4 Cranch C. Ct. 193.*

20. Service by Mail.—Service may be made by mail, where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail. (*Cal. Pr. Act, § 521.*) A party relying on a service by mail must show a strict compliance with the provisions in making service. (*People v. Alameda Turnpike Co., 30 Cal. 182.*) It shall be deposited in the post office, addressed to the person upon whom it is to be served, at his place of residence, and the postage paid, and in such case the time of service shall be increased one day for every twenty-five miles of distance between the place of deposit and the place of address, provided that the service in any case shall be deemed complete at the end of ninety days from the date of its deposit. (*Cal. Pr. Act, § 522.*) And the distance is a question of fact to be determined by the proof. *Neely v. Naglee, 23 Cal. 152.*

18. Service on Non-Residents.—When a party who has appeared resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers when required shall be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt. *Cal. Pr. Act*, § 524.

19. Successive Actions.—Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom. *Cal. Pr. Act*, § 525.

20. Sufficient Notice.—Whatever is sufficient to put a party on inquiry, and when a party has knowledge of the facts, legal notice is given. (The "Ploughboy," 1 *Gall.* 41.) A paper which refers to an other paper within the power of the party gives notice of the contents of that other paper. *Livingston v. Maryland Ins. Co.*, 7 *Cranch*, 506.

21. Time.—When a written notice of a motion is necessary, it shall be given, if the Court be held in the same district with both parties, five days before the time appointed for the hearing; otherwise ten days; but the Court, or Judge, or County Judge may prescribe a shorter time. (*Cal. Pr. Act*, § 517.) Against a motion there seems to be no statute of limitations, and it may be made when there is no unreasonable delay. *Reynolds v. Harris*, 14 *Cal.* 668.

22. Title of Action.—An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding. *Cal. Pr. Act*, § 531; *Mills v. Dunlap*, 3 *Cal.* 94.

23. Transfer of Motions and Orders.—When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the Judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought. *Cal. Pr. Act*, § 518.

No. 957.

*Affidavit Denying Genuineness and Due Execution of Written Instrument
in a Pleading.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff [*or* defendant] in the above entitled cause.

II. The note [*or* bill, *or* other written instrument], set forth in the answer of the defendant herein is not my note [*or* was not made *or* indorsed *or* accepted by me, *or* otherwise denying the making *or* executing of the instrument].

[SIGNATURE.]

[*Jurat.*]

23. Denial of Execution.—When a copy of a written instrument is contained in an answer or annexed thereto, to avoid an admission of its genuineness or due execution, the plaintiff must file with the Clerk, five days before the commencement of the term, an affidavit denying the same. *Cal. Pr. Act*, § 54.

No. 958.

*Notice of Motion for Order Allowing Party to Enter on Land and
make Survey, etc., in Actions Concerning Real Property.*

[TITLE.]

To G. H., attorney for defendant:

Please take notice that A. B., the plaintiff herein, will, on the day of, 18 . . , at the hour of o'clock, A.M., or as soon thereafter as counsel

can be heard, at the court room of said Court, in the City Hall in the City of, move said Court to grant the plaintiff herein an order allowing him the right to enter upon the property in controversy in this action, and to make survey and measurement thereof for the purpose of this action.

[SIGNATURE.]

[DATE.]

24. Actions for Real Property.—The court in which an action is pending for the recovery of real property may, or a judge thereof, or a county judge, may, on motion upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, for the purpose of the action. *Cal. Pr. Act*, § 258.

25. Service of Order.—The order shall describe the property, and a copy thereof shall be served on the owner or occupant, and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property, he shall be liable therefor. *Cal. Pr. Act*, § 259.

No. 959.

Certified Copy of Order.

[TITLE.]

[*Copy of Order.*]

I,, Clerk of the District Court of the Judicial District, in and for the County of, do hereby certify that the foregoing is a full, true, and correct copy of an order made

in the above entitled action, on the date mentioned in the caption thereof.

In witness whereof, I have hereunto set my hand and the seal of the said Court, this day of, 18...

[SEAL.]

[SIGNATURE.]

No. 960.

Notice Requiring Security for Costs.

[TITLE.]

To, attorney for plaintiff:

Please take notice that the defendant C. D. requires security on the part of the plaintiff A. B., for the costs and charges which may be awarded against said plaintiff in this action, in accordance with the statute in such case made and provided, said plaintiff being a non-resident of this State [*or* a foreign corporation].

[DATE.]

[SIGNATURE.]

26. Dismissal of Action.—After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking has been filed, the Court or Judge may order the action to be dismissed. *Cal. Pr. Act*, § 514.

27. From whom Required.—Security for costs and charges which may be awarded against the plaintiff may be required by the defendant: *First*, When the plaintiff resides out of the State. *Second*, Where he is a foreign corporation. (*Cal. Pr. Act*, § 512.) A plaintiff who is a non-resident at the time of commencing his action is not excused from filing security for costs by the fact that he afterwards became a resident. (*Ambler v. Ambler*, 8 *Abb. Pr.* 340.) The defendant has the right to security for costs only, where all the plaintiffs are non-

residents. (*Ten Broeck v. Reynolds*, 13 *How. Pr.* 462.) A foreign government suing in a court of the State may be required to file security for costs. *Republic of Mexico v. Arrangois*, 3 *Abb. Pr.* 470.

28. Justification.—The sureties on the undertaking for security of costs must each justify in double the amount specified in the undertaking. *Cal. Pr. Act*, § 513.

29. New Security.—Where plaintiffs have once put in security for costs required by statute, they cannot be ordered to file new security, although the security on the original undertaking became insolvent. (*Hartford Quarry Co. v. Pendleton*, 4 *Abb. Pr.* 460.) A new or additional undertaking may be ordered, upon proof that the original undertaking is insufficient, and proceedings are stayed till such new security be given. *Cal. Pr. Act*, § 512.

30. Service of Notice.—Where defendant, December 19th, under Sections five hundred and twelve and five hundred and fourteen of the Practice Act, served on plaintiff, a non-resident, notice to give security for costs, the notice not being accompanied with an order staying proceedings, and on the next day judgment was rendered for defendant, and plaintiff appealed to the Supreme Court: *Held*, on motion to dismiss the appeal, that after judgment it was too late to move to dismiss the action; that the undertaking on appeal is sufficient security for costs subsequently incurred, and that the motion must be denied. *Comstock v. Clemens*, 19 *Cal.* 77.

31. Stay of Proceedings.—When security is required, all proceedings shall be stayed until security by undertaking is given, not exceeding the sum of three hundred dollars. *Cal. Pr. Act*, § 513.

CHAPTER II.

ITEMS OF ACCOUNT.

No. 961.

Copy of Account.

[TITLE.]

[*Here set forth the account referred to in the pleading.*]

To, attorney:

Please take notice, that the above is a copy of the account demanded by you [*or referred to in the complaint or answer*] in this action.

[SIGNATURE.]

[DATE.]

1. Demand for Items.—Within five days after a demand thereof in writing, a copy of the account shall be delivered to the adverse party, or evidence thereof cannot be given, and if too general or defective a further account may be ordered. *Cal. Pr. Act*, § 56.

2. Items Set Forth.—The items of the account furnished must be set forth with as much particularity as the nature of the case admits of. (*Bagley's Pr.* 204; *Connor v. Hutchinson*, 17 *Cal.* 280; *Kellogg v. Paine*, 8 *How. Pr.* 329; *Brown v. Williams* 4 *Wend.* 368.) A pleading is sufficiently specific if it apprises the opposite party of the evidence to be offered. (*Smith v. Hicks*, 5 *Wend.* 48.) If a complaint in an action to recover money for legal services is general in its language, and the defendant demands and receives a bill of particulars, he cannot object

to the admission of evidence under it. (*Tompkins v. Mahoney*, 32 *Cal.* 231.) If the party intends to object to any evidence upon the subject, he should have obtained, *previous to the trial*, an order excluding such evidence. *Connor v. Hutchinson*, 1 *Cal.* 437.

4. What Need not be Set Forth.—A party is not bound to furnish particulars of set-offs with which he volunteers to credit the opposite party; (*Williams v. Shaw*, 4 *Abb. Pr.* 209; *Giles v. Betz*, 15 *Abb. Pr.* 285;) nor when a knowledge of the facts on which a party's claim rests is more with the defendant than the plaintiff. (*Young v. De Mott*, 1 *Barb.* 30.) Where the complaint in *hæc verba* set forth the bill of sale, it was held to remedy a defect in the quantity of goods sold. A party must be presumed to know what was intended by his own account. *Cochran v. Goodman*, 3 *Cal.* 244.

No. 962.

Affidavit to Obtain Further Bill of Particulars.

[TITLE.]

[VENUE.]

C. D., the defendant herein, being duly sworn, says:

That the plaintiff herein, on request of the defendant's attorney, served upon the defendant's attorney a bill of particulars, of which the annexed is a copy; and that said bill is defective and insufficient to enable the defendant to answer [*state in what respect it is defective*]; and that a further and better bill of particulars in this respect is essential and material to the defense of the defendant in this action.

[SIGNATURE.]

[*Jurat.*]

5. Motion Essential.—The party on whom a bill of particulars is served, if not satisfied with it, either from defect in form or substance, or because it is not verified, should immediately return it, or move the

Court for a further or amended bill. (*Dennison v. Smith*, 1 *Cal.* 437; *McKinney v. McKinney*, 12 *How. Pr.* 22.) Failing to do so, he cannot proceed as if no bill was rendered. *Providence Tool Co. v. Prader*, 32 *Cal.* 634.

No. 963.

Order for a Further Bill of Particulars.

[TITLE.]

On the annexed affidavit, let the plaintiff's attorney deliver to the defendant's attorney a further account in writing of the particulars of the plaintiff's demand for which this action is brought, within days, specifying the dates of the said several items.

[DATE.]

[SIGNATURE.]

6. Order.—An order of the Court for a further account should specify the particulars in reference to which a further specification is required. (*Connor v. Hutchinson*, 17 *Cal.* 280; *Kellogg v. Paine*, 8 *How. Pr.* 329.)* And such order should be procured before the trial. *Connor v. Hutchinson*, 17 *Cal.* 280; *Yates v. Bigelow*, 9 *How. Pr.* 186.

CHAPTER III.

ENLARGING TIME TO PLEAD.

No. 964.

Notice of Motion to Enlarge Time to Plead.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit, a copy of which is herewith served, the undersigned will move the Court, at the court room thereof, at, on the day of, 18.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, to enlarge the time to answer herein days, from and after the day of, 18.., or for such other relief as may be just.

* [SIGNATURE.]

[DATE.]

NOTE.—This is rarely done in the course of the practice; the time will be granted, if at all, without motion.

1. Discretion.—The Court may, in furtherance of justice, and on such terms as may be proper, enlarge the time for an answer or demurrer, or demurrer to an answer filed. (*Cal. Pr. Act*, § 68.) Or may allow an answer to be made after the time limited by this Act. (*Cal. Pr. Act*, § 68.) A demurrer shall not be deemed waived by the filing of an answer at the same time of filing the demurrer; and when the demurrer to a complaint is overruled, and there is no answer filed, the Court may upon terms allow an answer to be filed. (*Cal. Pr. Act*, § 67.) It is always within the power of a court, when exercising proper

discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. *Wood v. Forbes*, 5 *Cal.* 62.

2. Practice.—Cases which were decided previous to this enactment: (*Carpentier v. Hart*, 5 *Cal.* 406; *Morrison v. Dapman*, 3 *Cal.* 255; *Bell v. Thompson*, 19 *Cal.* 706; *Suydam v. Pitcher*, 4 *Id.* 280; *Shaw v. McGregor*, 8 *Id.* 521.) Where the provision of the Statute applied only to cases where the summons had not been served. By the Statute all cases now come under the above rule. (*Casement v. Ringold*, 28 *Cal.* 338.) Where a demurrer to a complaint is overruled, and an application is subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the Court, subject to review in case of its arbitrary or unreasonable exercise. The exercise of this power by the Court must in a great degree depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice. (*Thornton v. Borland*, 12 *Cal.* 438.) In such case, where no application was made to the Court for leave to answer, and no meritorious defense was asserted, this Court will not reverse the judgment and open the case for another trial. *Id.*

No. 965.

Affidavit on Motion to Enlarge Time to Plead.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above entitled action.

II. I have fully and fairly stated the case in this cause to G. H., my counsel therein, who resides at [*or* at No., Street, in the City of]; and I have a good and substantial defense, on the merits, to said action, as I am advised by my said counsel, and verily believe.

III. [*State excuse for desiring enlargement of time.*]

IV. That the complaint was served on the of , 18... , and the time to answer will expire on the day of , that no extension of such time has been had, and days further time are necessary to prepare and file said answer.

[*Jurat.*]

[SIGNATURE.]

No. 966.

Order Enlarging Time to Plead.

On the annexed affidavit of C. D., and on motion of G. H. his attorney, it is ordered that said defendant have days further time from and after the day of , 18... , to answer the complaint of plaintiff herein.

[SIGNATURE OF JUDGE.]

[DATE.]

CHAPTER IV.

AMENDMENTS.

1. Pleadings may be amended: *First*, As a matter of course, after demurrer is interposed, and before the hearing thereof; and, *Second*, For other reasons which appeal to the discretion of the Court. (*Cal. Pr. Act*, § 67.) An amendment must be substantial, not merely colorable. (*Snyder v. White*, 6 *How. Pr.* 321.) Adding a verification to a complaint is not an amendment. (*George v. McAvoy*, 6 *Id.* 200.) And it will not be

allowed where the original pleading was not verified. (*San. Fran. Dist. Ct., Rule No. 15.*) Amendments can only be allowed where there is a defect in the parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case. 1 *Edw. Ch.* 46; *Story's Eq. Pl.* 884; *Shields v. Barrow*, 17 *How. U.S.* 130.

2. Amendments will be allowed to any extent, provided no new cause of action in substance is added; (*Hollister v. Livingston*, 9 *How. Pr.* 140;) as amendments substantially changing the claim or defense cannot properly be granted at any time. (*Wright v. Delafield*, 25 *N.Y.* 266; *Bailey v. Johnson*, 1 *Daly*, 61; *Woodruff v. Dickie*, 31 *How. Pr.* 164; *Ransom v. Wetmore*, 39 *Barb.* 104; *Whitcomb v. Hungerford*, 42 *Barb.* 177.) That an amendment may add a new cause of action, see (*Mason v. Whitely*, 4 *Duer*, 611; 1 *Abb. Pr.* 85; and see *Wyman v. Redmond*, 18 *How. Pr.* 272; *Macqueen v. Babcock*, 13 *Abb. Pr.* 268; *Townsend v. Platt*, 5 *Abb. Pr.* 323; *Thompson v. Minford*, 11 *How. Pr.* 273; *Griffin v. Cohen*, 12 *How. Pr.* 451; *Spencer v. Tooker*, 12 *Abb. Pr.* 354; 21 *How. Pr.* 233; *Fielden v. Caselli*, 26 *How. Pr.* 173; 16 *Abb. Pr.* 289; but see *Woodruff v. Dickie*, 5 *Rob.* 619.) Though the Court should not allow a new and wholly different case to be made. (1 *Edw. Ch.* 46; *Story's Eq. Pl.* 884; *Shields v. Barrow*, 17 *How. U.S.* 130; *Schofield v. Fitzhugh*, 1 *Cranch C. Ct.* 108; The "Harmony," 1 *Gall.* 123.) A court of chancery should rarely, if ever, permit amendments so changing the character of the pleadings as to make substantially a new case after the cause has been tried. (*Walden v. Bodley*, 14 *Pet.* 156.) Plaintiff

may amend by a new count, introductive of a new cause of action, if it correspond in character with the original count in a kindred cause, admitting the same pleading and defense, and which might have been included in the original declaration. (*Tiernan v. Woodruff*, 5 *McLean*, 135.) For the purpose of determining whether new matter is entirely foreign to the cause of action in the original complaint, the original complaint must be liberally constructed. *Nevada Co. and Sac. Canal Co. v. Kidd*, 28 *Cal.* 673.

3. Plaintiff cannot amend so as to change an action *ex contractu* to one *ex delicto*. (1 *Van Sautv.* 768; *Ramirez v. Murray*, 5 *Cal.* 222; *Lane v. Beany*, 19 *Barb.* 51; 1 *Abb. Pr.* 65.) Nor to change the mode of trial. (*McCarty v. Edwards*, 24 *How. Pr.* 236; *Craig v. Hyde*, *Id.* 313.) Nor can the plaintiff, in ejectment, set up title acquired after commencement of suit. (*Smith v. Billet*, 15 *Cal.* 26.) So, also, facts which occur subsequent to filing the complaint, and which change the liabilities of the defendants, cannot be incorporated by amendment. *Van Maren v. Johnson*, 15 *Cal.* 308; *Woodruff v. Dickie*, 31 *How. Pr.* 164; *Sheldon v. Adams*, 18 *Abb. Pr.* 405; 41 *Barb.* 54; 27 *How. Pr.* 179.

4. An amendment may strike out a cause of action. (*Watson v. Rushmore*, 15 *Abb. Pr.* 51.) An amended pleading cannot set up matter which occurred after suit brought. (*Hornfager v. Hornfager*, 6 *How. Pr.* 13; *Lampson v. McQueen*, 15 *Id.* 345.) It must be presented by supplemental pleading. In an action for a fraudulent sale of a mine, an amendment striking out the offer to return the deed does not change the

issues tendered. (*Ahrens v. Adler*, 33 *Cal.* 608.) A plaintiff may amend by filing a more full and particular account. (*Estate of Hidden*, 23 *Cal.* 362; *Valencia v. Couch*, 32 *Id.* 339.) How far the discretion of the Court in allowing amendments so as to change the form of action is restricted by the Code, discussed in (*Brown v. Babcock*, 3 *How. Pr.* 305; *Spalding v. Spalding*, 3 *Id.* 297; *Daws v. Green*, *Id.* 388; also, 1 *How. Pr.* 82; 2 *Id.* 43; 3 *Id.* 148; *Field v. Morse*, 8 *How. Pr.* 47; *Forniss v. Brown*, 8 *How. Pr.* 59; *McGrath v. Van Wyck*, 2 *Sand.* 654; *Houghton v. Latson*, 10 *Leg. Obs.* 22; *Beardsley v. Stover*, 7 *How. Pr.* 294; *Dutcher v. Slack*, 3 *How. Pr.* 322;) the authorities, in some instances, going so far as to say that even the cause of action may be changed by amendment, while others advocate a restricted exercise of discretion. In California, as a rule, the courts are extremely liberal as to amendments.

AMENDMENTS OF COURSE.

5. Amendments of course may be made, without costs to either party, to a pleading, before the trial of the issue of law, on a demurrer filed thereto. (*Cal. Pr. Act*, § 67; *N.Y. Code*, 172; 1 *Van Santv. Pl.* 792; 1 *Whitt. Pr.* 611; 1 *Barb. Ch. Pl.* 206, 25; *Allen v. Marshall*, 34 *Cal.* 165; *Lord v. Hopkins*, 30 *Cal.* 76; *Barber v. Reynold*, 33 *Cal.* 497.) But a party shall not so amend more than once. (*Cal. Pr. Act*, § 67; *N.Y. Code*, 172.) If the defendant demurs to the complaint, it is an error for the Court to refuse the plaintiff leave to amend his complaint before the decision on the demurrer. (*Lord v. Hopkins*, 30 *Cal.* 76; *Sands v. Calkins*, 30 *How. Pr.* 1; *Jeroliman v. Cohen*, 1 *Duer*, 631; *White v. Mayor of N.Y.*, 5 *Abb. Pr.* 322;

14 *How. Pr.* 495; see *Ross v. Dinsmore*, 12 *Abb. Pr.* 4; 20 *How. Pr.* 326.) After demurrer, and before argument and submission of the issue thereon, either party may amend a pleading, by filing the same as amended, and serving a copy on the adverse party or his attorney, who has ten days to answer or demur thereto. *Cal. Pr. Act*, § 67.

6. The right to amend, as of course, is absolute, and cannot be interfered with, unless the amendment is merely colorable, and made for purposes of delay only. (*Griffin v. Cohen*, 8 *How. Pr.* 451; *Farrand v. Herbeson*, 3 *Duer*, 658; *Burrall v. Moore*, 5 *Id.* 654; *Cooper v. Jones*, 4 *Sand.* 699; *Rogers v. Rathbun*, 8 *How. Pr.* 466; *Thompson v. Mumford*, 11 *How. Pr.* 273; *Spencer v. Tooker*, 12 *Abb. Pr.* 353.) And though absolute it may be waived, either by express notice or noticing cause for trial. (1 *Van. Santv.* 796; *Cusson v. Whalen*, 5 *How. Pr.* 305.) A party may amend of course where the same amendment would be allowed at the trial. *Getty v. Hudson Riv. R.R. Co.*, 6 *How. Pr.* 269.

7. An amendment that would have the effect of changing the parties to the action will not be allowed. (11 *Ill.* 587; *Russell v. Spear*, 3 *N.Y. Code R.* 189; *Chase v. Dunham*, 1 *Paige*, 572.) Nor, without amending the summons, can the names of additional defendants be introduced. (*Follower v. Laughlin*, 12 *Abb. Pr.* 105.) And a summons cannot be amended without leave of Court. (*Walkenshaw v. Purzell*, 32 *How. Pr.* 301.) An amendment of course will not be allowed which sets up a different claim. (1 *Van Santv.* 798; *Chapman v. Webb*, 6 *How Pr.* 390; but see *Lowe v.*

Beam, 1 *Abb. Pr.* 65.) But an amendment could be allowed by inserting a count for goods sold and delivered without terms, and allowing the trial to proceed; such is not a case changing substantially the claim. (23 *N.Y.* 357; 20 *Id.* 81; *Id.* 355; 18 *Id.* 515; 22 *Barb.* 161; 44 *Id.* 528; 11 *How. Pr.* 168; *Vibbard v. Roderick*, 51 *Barb.* 616.) And "other allegations material to the case" may be introduced. (*Jeroliman v. Cohen*, 1 *Duer*, 632.) But an amendment of course cannot introduce circumstances happening after commencement of the action. (*Hornfager v. Hornfager*, 1 *Code R. (N.S.)* 180.) The above are not all good authority in California, but may be consulted with profit.

8. A complaint may be amended, of course, at any time before summons is issued. (*Allen v. Marshall*, 34 *Cal.* 165.) Or at any time before defendant has put in his defense. (1 *Van Santv.* 792; *Cussen v. Whalen*, *How. Pr.* 302; *Washburn v. Herrick*, 4 *Id.* 15.) Answers containing denials only cannot be amended of course, but answers containing new matter may. (*Farrand v. Herbeson*, 3 *Duer.* 655; *Plumb v. Whipple*, 7 *How. Pr.* 411; *Townsend v. Platt*, 3 *Abb. Pr.* 325; *Lampson v. McQueen*, 15 *How. Pr.* 345.) Defendant cannot amend his answer by inserting an averment which is but a conclusion of law. (*Levinson v. Swartz*, 22 *Cal.* 229.)

AMENDMENT BY LEAVE OF COURT.

9. The judge presiding at the trial has full power of amendment of pleadings. (*Jacobs v. Hooker*, 1 *Edm.* 472; *Woodruff v. Dickie*, 5 *Rob.* 619.) But a referee cannot order an amendment. (1 *Van Santv.* 820; *De la Riva v. Berreyessa*, 2 *Cal.* 195; *Holmes v. Slocum*,

1 *C.R.* 380.) In New York, however, referees of whole issues may order an amendment. *Woodruff v. Dickie*, 31 *How. Pr.* 164; *Hoyt v. Hoyt*, 8 *Bosw.* 511; *Secor v. Low*, 9 *Id.* 163; *Dunnigan v. Crummey*, 44 *Barb.* 528.

10. Amendments should be liberally allowed by the Court, in furtherance of justice. (1 *Van Santv.* 809; *Cook v. Spears*, 2 *Cal.* 409; *Stearns v. Martin*, 4 *Id.* 227; *Butler v. King*, 10 *Id.* 342; *Smith v. Yreka Wat. Co.*, 14 *Id.* 201; approved in *Lord v. Hopkins*, 30 *Id.* 78; *McMillan v. Dana*, 18 *Id.* 339; *Roland v. Kreyenhagen*, 18 *Id.* 455; *Pierson v. McCahill*, 22 *Id.* 127; *Vanderbilt v. Access. Transit Co.*, 9 *How. Pr.* 352.) But the refusal to allow them is presumed to be right, unless the character of the proposed amendment is shown on the record. *Jessup v. King*, 4 *Cal.* 331.

11. Amendments are within the discretion of the Court, and cannot be controlled by *mandamus*. (*Jackson v. Smith*, 1 *Paine*, 453; to the same effect, *Exp. Bradstreet*, 7 *Pet.* 634.) And are governed by their own rules and modes of practice. *Wright v. Hollingworth*, 1 *Pet.* 165; *Walden v. Craig*, 7 *Wheat.* 576; *United States v. Buford*, 3 *Pet.* 12.

12. Where the pleading is defective, demurrer should be sustained, and leave be granted to amend. (*Gallagher v. Delaney*, 10 *Cal.* 410; *Mead v. Mead*, 15 *How. Pr.* 353.) And if the plaintiff then declines, final judgment should be given; (*Gallagher v. Delaney*, 10 *Cal.* 410;) unless the complaint is so defective that it cannot be made good by amendment. (*Lord v. Hopkins*, 30 *Cal.* 76.) After demurrer sustained, amendments may be made upon motion. (*Smith v. Yreka Wat.*

Co., 14 *Cal.* 201; *Gallagher v. Delaney*, 10 *Cal.* 410.) The party desiring amendment after demurrer sustained, must make his motion to the Court, and he cannot object on appeal that he was not permitted to amend, when he made no offer. *Smith v. Yreka Wat. Co.*, 14 *Cal.* 201.

13. After demurrer sustained, defendant may be allowed to amend. (*Pierson v. McCahill*, 22 *Cal.* 127; *Fish v. Reddington*, 31 *Id.* 186.) After demurrer to defendant's answer sustained, it is in the discretion of the Court to allow defendant to amend. (*Gillan v. Hutchinson*, 16 *Cal.* 153.) Demurrer sustained, and plaintiff amends by making two counts instead of one. He cannot, after trial, complain of error in sustaining the demurrer. (*Gale v. Tuolumne Water Co.*, 14 *Cal.* 25.) To test the ruling on the demurrer, he should have gone to trial on the pleadings where the judgment on demurrer left them. (*Id.*) In demurrer overruled to defective complaint, if defendant answers over, Court will treat such complaint as amended. *Ward v. Moorey*, *Wash. Ter.* 1864, p. 123.

14. The filing of a new complaint after demurrer sustained is not the commencement of a new action. (*Jones v. Frost*, 28 *Cal.* 245.) So of an amended answer which supersedes the original. (*Id.*; *Gilman v. Cosgrove*, 22 *Cal.* 356.) They simply take the place of the originals. (*Barber v. Reynolds*, 33 *Cal.* 497; *Sands v. Calkins*, 30 *How. Pr.* 1; *Allen v. Compton*, 8 *Id.* 251.) And copies of the instruments sued on must be annexed thereto. *McEwen v. Hussey*, 23 *Ind.* 395.

AMENDMENT UPON AFFIDAVIT FOR GOOD CAUSE.

15. The Court may, likewise, upon affidavit showing good cause therefor (1 *Van Santv.* 814), after notice to the adverse party (*Fassett v. Tallmadge*, 15 *Abb. Pr.* 205), allow, upon such terms as may be just, an amendment to any pleading (*Cal. Pr. Act*, § 68; *Arnold v. Arnold*, 20 *Iowa*, 273), at any stage of the trial, in furtherance of justice. 1 *Whitt. Pr.* 626; 1 *Scam.* 45; 3 *Scam.* 342; *Id.* 45; 32 *Ill.* 331; 35 *Ill.* 22; 47 *Maine*, 492; 42 *N.H.* 25; *Peters v. Foss*, 16 *Cal.* 357; *Lestrade v. Barth*, 17 *Cal.* 285.

16. The allowance of amendments at the trial is in the discretion of the Court; (1 *Van Santv.* 812, 818; 1 *Whitt. Pr.* 617; *Peterbaugh's Ill. Pr.* 526; 2 *Scam.* 33; 24 *Ill.* 196; 32 *Ill.* 331; 16 *Ill.* 390; *Thornton v. Borland*, 12 *Cal.* 438; *Gillan v. Hutchinson*, 16 *Id.* 153; *Cooke v. Spears*, 2 *Cal.* 438; *Stearns v. Martin*, 4 *Id.* 227;) and that discretion will rarely be revised; (*Pierson v. McCahill*, 22 *Cal.* 127;) but for its abuse, the appellate court will interfere. (*Cooke v. Spears*, 2 *Cal.* 409.) Where, from oversights of counsel committed under pressure of business, pleadings are defective, amendments should be allowed with great liberality. In such cases, when an offer to amend is made at such a stage of the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality. *Kierstein v. Madden*, *Cal. Sup. Ct., Jul. T.*, 1869.

17. Where the defendant lies by until trial, before objecting to the sufficiency of the complaint, it is a prop-

er exercise of discretion in the Court or referee to allow the necessary allegations to be supplied by amendment, if they do not amount to a new cause of action. (18 *N.Y.* 515; *Woolsey v. Trustees of Rondout*, 2 *Keyes*, 603.) But leave to amend allegations filed against an insolvent debtor was refused after the jury was sworn. (*Newton's Case*, 2 *Cranch C. Ct.* 467.) No material amendment can be allowed after the cause has been submitted to the jury, or a finding has been announced by a court. *Holcraft v. King*, 25 *Ind.* 352.

18. Where, in the course of a trial, it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the Court should allow amendments on such terms as may be just; (*Stringer v. Davis*, 30 *Cal.* 218;) at any time after the commencement of the trial. *Peters v. Foss*, 16 *Cal.* 357; *Lestrade v. Barth*, 19 *Cal.* 660; *Gavitt v. Doub*, 23 *Cal.* 78.

19. An amendment to the complaint may be allowed even at the commencement of the trial. (*Gavitt v. Doub*, 23 *Cal.* 78;) or after a motion for nonsuit, if it would not operate as a surprise upon the defendant. (*Farmer v. Cram*, 7 *Cal.* 135; *Valencia v. Couch*, 32 *Cal.* 339; *Balcom v. Woodruff*, 7 *Barb.* 14.) It is always in time when it immediately follows an objection to the pleading. (*Valencia v. Couch*, 32 *Cal.* 339.) A motion to amend a complaint does not come too late because made after plaintiff has closed his testimony. (*Valencia v. Couch*, 32 *Cal.* 339.) And after defendants have closed their case, and before the case is submitted, plaintiffs may be allowed to supply

an omission in the testimony occasioned by mistake or inadvertence. (*Priest v. Union Canal Co.*, 6 *Cal.* 170.) A complaint may be amended before judgment and after verdict, so as to conform to the verdict. (*Hooper v. Wells*, 27 *Cal.* 35.) And therefore cannot be allowed in the appellate court (*Id.*), unless the appeal be taken from judgment on demurrer (*Phelan v. Supervisors*, 9 *Cal.* 15), or from an order denying a new trial. *Argenti v. San Francisco*, 30 *Cal.* 458.

20. Defendant may amend and show that the whole interest in a joint counter claim has been transferred to him. (*Stearns v. Martin*, 4 *Cal.* 229.) Or he may amend by inserting new matter; (*Pierson v. McCahill*, 22 *Cal.* 127;) if not entirely foreign to the cause of action. (*Nevada and Sac. Co. Canal Co. v. Kidd*, 28 *Cal.* 673.) The fact that such new matter was well known to defendant at the time the original answer was filed is no good reason why the amendment should not be permitted. (*Pierson v. McCahill*, 22 *Cal.* 127.) Defendant may amend by striking out counter claim, and setting up the defense of the Statute of Limitations. (*Wynan v. Remond*, 18 *How. Pr.* 272; *contra*, *Field v. Morse*, 8 *How. Pr.* 48; *Hollister v. Livingston*, 9 *Id.* 140.) Or one of two defendants may be permitted severally to plead the Statute, by filing a separate plea; (*Robinson v. Smith*, 14 *Cal.* 244;) as it may be pleaded at any time. *Cook v. Spears*, 2 *Cal.* 409; *Stuart v. Sander*, 16 *Cal.* 372.

21. A defendant, by amending his answer, and taking issue on a new cause of action added to the complaint by amendment, waives all objection to such amendment. (*Secor v. Law*, 9 *Bosw.* 163.) Where

an amended answer is complete in itself, and is inconsistent with the original answer, the two cannot stand together. (*Kuhland v. Sedgwick*, 17 *Cal.* 123.) Under the Code of Louisiana, which allows general and special pleas if not inconsistent with each other, an amended answer, which but specifies a particular fact in aid of the general denial, is allowable. (*Andrews v. Hensler*, 6 *Wall. U.S.* 254.) If the plaintiff amends his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made. (*Mulford v. Estudillo*, 32 *Cal.* 131.)

22. An answer may be verified even at the close of the plaintiff's case. (*Angier v. Masterson*, 6 *Cal.* 61; *Arrington v. Tupper*, 10 *Cal.* 464; *Lattimer v. Ryan*, 20 *Cal.* 628.) If the defendant does not know that too many are joined as plaintiffs till after the same appears in evidence, he should then apply for leave to amend his answer. (*Gillam v. Sigman*, 29 *Cal.* 657; *Ackley v. Tarbox*, 31 *N.Y.* 564.) If testimony offered by defendant is rejected because of a defective denial, defendant should be allowed to amend his denial. (*Stringer v. Davis*, 30 *Cal.* 318.) If defendant have acquired title to the demanded premises during litigation, he should be allowed to amend his answer so as to obviate the objection to the introduction of testimony excluded by the Court under the original answer. (*McMinn v. O'Connor*, 27 *Cal.* 238.) But if the Court refuses to allow the amendment, and evidence shows that the amendment would be immaterial, no injury results from the refusal. (*Jones v. Black*, 30 *Cal.* 227.)

AMENDMENTS AFTER TRIAL.

23. Amendments after trial are allowed only with great caution, and on good cause shown. (1 *Van Santv.* 814; *Houghton v. Skinner*, 5 *How. Pr.* 420.) In New York, a mere formal amendment may be made after judgment. (*Clason v. Corley*, 5 *Sand.* 455; *Lettman v. Ritz*, 3 *Sand.* 734; *Debaix v. Lehind*, 1 *Code R. (N.S.)* 235.) But the power to amend after judgment is extraordinary, and should be very sparingly exercised. (*Field v. Hawkhurst*, 9 *How. Pr.* 75; *Malcom v. Baker*, 8 *How. Pr.* 301; *Davis v. Garr*, 7 *How. Pr.* 311; *Egert v. Wicker*, 10 *How. Pr.* 193.) Errors in the computation of interest may be corrected by motion in the court below. (*Whitney v. Bankman*, 13 *Cal.* 536.) A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not ground for reversal. * (*Anderson v. Parker*, 6 *Cal.* 197.) A court has the power to make an amendment *nunc pro tunc*, by supplying the omission of a clerk to enter the appointment of a guardian *ad litem*. (*Sprague v. Litherberry*, 4 *McLean*, 442.) Where the decree is defective in not designating the defendants who are personally liable for the debt, and the record shows who they are, the Court has the power to amend the judgment at any time by adding a clause designating the defendants who are personally liable. The proper remedy in such a case is to move to amend the judgment by supplying the omission. (*Leviston v. Swan*, 33 *Cal.* 480.) An omission of an averment necessary to give jurisdiction cannot be amended after judgment. *Smith v. Jackson*, 2 *Edw.* 28; compare *Fisher v. Rutherford*, 1 *Baldw.* 188.

24. The Court has power to authorize amendments when there is anything in the record to amend by. (Randolph *v.* Barrett, 16 *Pet.* 138.) Such as clerical errors in its own records, even after a great lapse of time. (Cromwell *v.* The Bank of Pittsburg, 2 *Wall. jr. C. Ct.* 569; see Smith *v.* Jackson, 1 *Paine*, 486.) A court may at any time render or amend a judgment, *nunc pro tunc*, where the record discloses that it is incorrectly given as the judgment of the Court. (Morrison *v.* Dapman, 3 *Cal.* 255.) While the term lasts, the Court has power to amend the records. After the term has passed, the record cannot be amended, unless there is something in the record to amend by. Branger *v.* Chevalier, 9 *Cal.* 172.

25. Where, on appeal from any order granting a new trial, the Supreme Court affirmed the "judgment" below, and the *remittitur* was issued, and then, at a subsequent term, respondent moved the Court to amend its judgment by making it read: "the order of the District Court granting a new trial is affirmed," instead of, "the judgment is affirmed:" *Held*, that the motion will be granted, on the principle that courts have the power to amend clerical errors, and enter a judgment, *nunc pro tunc*, where the record itself discloses the error, even though the term has elapsed. Costs of the motion not allowed. Swain *v.* Naglee, 19 *Cal.* 127.

26. After an appeal in which judgment on the demurrer sustained is affirmed, plaintiff cannot be granted leave to amend complaint. (Bryan *v.* Berry, 8 *Cal.* 134; People *v.* Jackson, 24 *Cal.* 633.) Where a demurrer to a complaint is sustained in the court below, and plaintiff declines to amend, and appeals from the

judgment and the order sustaining the demurrer, the Supreme Court, if it affirm the judgment, cannot grant plaintiff leave to amend his complaint. (*People v. Jackson*, 24 *Cal.* 633.) When a final judgment, on demurrer to the complaint, sustaining the demurrer, was reversed, the plaintiff had the right to amend on application to the court below. *Williamson v. Blattan*, 9 *Cal.* 500; *Phelan v. City of San Fran.*, 9 *Cal.* 15; *McDonald v. Bear River Water and Mining Co.*, 15 *Cal.* 149.

27. Upon the trial, every material allegation of the complaint not specifically controverted is to be taken as true, but if the defendant supposed he had denied material allegations, and the Court sustained his view of the answer, the appellate court, when it reverses the judgment, may allow the court below to exercise its discretion in permitting the answer to be amended. (*Fish v. Reddington*, 31 *Cal.* 186.) Thus, where a judgment in favor of defendant had been reversed by the Supreme Court, on the ground that certain material evidence, which had been received in his favor, was inadmissible under his answer, and on the second trial defendant moved to amend his answer by inserting averments of new matter obviating the objection: *Held*, That as the amendment was evidently necessary to enable the defense to be fully presented, it was properly allowed by the Court. *Pierson v. McCahil*, 22 *Cal.* 127.

28. On appeal taken by defendant immediately after judgment on default, on the ground of insufficiency of the affidavit of publication of summons, the appellate court will not disturb the judgment, the defendant hav-

ing his remedy in the courts below within six months after judgment. (*Guy v. Ide*, 6 *Cal.* 99.) Upon the *remittitur* of a cause to the court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so. *McDonald v. Bear River Water and Mining Co.*, 15 *Cal.* 149.

WHAT AMENDMENTS SHOULD BE ALLOWED.

29. Plaintiffs should be permitted so to amend as to present for determination their legal rights. (*McDonald v. Bear River and Auburn Water and Mining Co.*, 15 *Cal.* 145; *Nevada and Sacramento Canal Co. v. Kidd*, 28 *Cal.* 673.) Or, to express the cause of action originally intended. (*Id.*) Or, to strike out a cause of action. (*Watson v. Rushmore*, 15 *Abb. Pr.* 51.) Or, to strike out a claim for damages. (*Grass Valley Quicksilver Mining Co. v. Stackhouse*, 5 *Cal.* 413.) Or, to increase the amount of damages claimed. (1 *Van Santv.* 364; *Gregg v. Grex*, 4 *McLean*, 208.) Even after issue joined. (*Merchant v. N.Y. Life Ins. Co.*, 2 *Sand.* 659.) Or, to change the venue. (*Stryker v. N.Y. Exch. Bk.*, 42 *Barb.* 511.) If a wife should intervene in an action, or file a separate defense, plaintiff may amend. (*Moss v. Warner*, 10 *Cal.* 295.) A plaintiff may amend by inserting averments of prior appropriation, a diversion by defendants, with a prayer for an injunction. (*Nevada and Sacramento Canal Co. v. Kidd*, 28 *Cal.* 673.) In attachment, pending motion to dissolve the attachment, plaintiff may have leave to amend the complaint. (*Hathaway v. Davis*, 33 *Cal.* 161.) Circumstances authorizing an arrest, occurring subsequent to filing the complaint, should be set forth

in an amended complaint. (*Davis v. Robinson*, 10 *Cal.* 411.) Leave may be granted to file blanks in complaint, and reply specially to plea of Statute of Limitations on payment of full costs. *Ferris v. Williams*, 1 *Cranch. C. Ct.* 281.

30. A variance between the suit and the complaint in respect to the return day may be amended. (2 *Wheat* 45; *Wilder v. McCormick*, 2 *Blackft.* 31.) The assignee may amend the assignment by inserting the words, "For value received, I hereby assign the within account." (*Ryan v. Maddox*, 6 *Cal.* 247.) A garnishee may amend his answer by correcting an error which could not reasonably have been avoided. (*Smith v. Browne*, 5 *Cal.* 118.) Petitions in railroad proceedings may be amended. (*Contra Costa R.R. Co. v. Moss*, 23 *Cal.* 325.) The omission to show an information, in the matter of a writ of *quo warranto*, that the offices usurped are corporate offices, may be amended. (*Guntton v. Ingle*, 4 *Cranch C. Ct.* 438.) In slander, by amendment the words charged may be changed. *Dougherty v. Bentley*, 1 *Cranch C. Ct.* 219.

31. Where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a court of equity, if his pleadings had been properly framed, amendments may be allowed to conform the pleadings to the facts proved. (*Stringer v. Davis*, 30 *Cal.* 318; *Conally v. Peck*, 3 *Cal.* 82; *Tryon v. Sutton*, 13 *Cal.* 494; *Valencia v. Couch*, 32 *Cal.* 339; *Hosley v. Black*, 28 *N.Y.* 438; *Bedford v. Terhune*, 30 *Id.* 453; *Walsh v. Washington Market Ins. Co.*, 32 *Id.* 427; *Rose v. Bell*, 38 *Barb.* 25; *Denman v. Prince*, 40 *Barb.*

213; *Gates v. Alden*, 41 *Id.* 172; *Van Buskirk v. Stow*, 42 *Id.* 9; *Dunnigan v. Crummey*, 44 *Id.* 528.) As to the propriety of allowing an amendment to conform the pleadings to the facts proved, consult the above authorities. If evidence is objected to, because the defense under which it is offered is defectively pleaded, the Court should allow the pleading to be amended. *Carpenter v. Small*, 35 *Cal.* 346.

32. In ejectment, amendments are liberally allowed. (*Walden v. Craig*, 9 *Wheat.* 576.) The date of the devise may be amended so as to conform to the title. (*Blackwell v. Patton*, 7 *Cranch*, 471; *Smith v. Vaughan*, 10 *Pet.* 367; *McDaniel v. Wailes*, 4 *Cranch C. Ct.* 201.) Or may extend the term of the fictitious lease even after judgment. (*Walden v. Craig*, 14 *Pet.* 147; *Ledgerwood v. Pickett*, 1 *McLean*, 143.) But amendments by adding a count stating a demise under a new title are not allowed, as distinct ejectments may be brought to try them. (*Gale v. Babcock*, 4 *Wash. C. Ct.* 199.) A declaration in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, stated two demises, by citizens of different States. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the Court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of a citizen of another State. *Held*, that a judgment upon the new count was valid. *Wright v. Hollingsworth*, 1 *Pet.* 165.

PRACTICE ON AMENDMENTS.

33. An amended complaint may be filed without prejudice to an injunction issued on the original com-

plaint. (*Barber v. Reynolds*, 33 *Cal.* 497.) Where an amendment is granted, it is more proper to file an amended bill than to interline the original. (*Pierce v. West*, 3 *Wash. C. Ct.* 354; *Walden v. Craig*, 14 *Pet.* 147; see 35.) If the complaint be amended, a copy of the amendments shall be filed, or the Court may in its discretion require the complaint as amended to be filed, and a copy of the amendments shall be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney. The defendant shall answer in such time as may be ordered by the Court, and judgment by default may be entered upon failure to answer as in other cases. (*Cal. Pr. Act*, § 43.) It has been held by our courts that when a demurrer is overruled with leave to answer, the Court need not fix the time within which to answer; the Court has power to do so. (*Cal. Pr. Act*, § 43.) If the time is not fixed, then the defendant should answer within the same time required in case of service of the original complaint. (*People v. Rains*, 23 *Cal.* 128.) When a demurrer to a pleading is sustained, the adverse party shall have ten days from service of notice of the entry of the order, in which to amend the pleading demurred to and to file and serve such amended pleading. (*San Fran. Dist. Court, Rule* 20.) The party whose demurrer has been sustained shall have ten days from such service in which to answer or demur to such amended pleading. (*Id.*) The Court may impose such terms as it may deem proper on granting leave to file such amended pleadings. *Id.*

34. An answer already filed may be allowed to stand as the answer to the amended complaint. (*Mulford v. Estudillo*, 32 *Cal.* 131.) If the plaintiff amends

his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made. (*Id.*) If the amendment introduces no new fact, and does not in any respect affect the merits of the case, the plaintiff may proceed without answer. (1 *Ves.* 250; 4 *Ves.* 65; *Blake's Ch. Pr.* 195; 2 *Wad.* 287; 1 *Harr. Ch.* 93; *Longworth v. Taylor*, 1 *McLean*, 514.) Where the defendant objects to an amendment of the complaint, except upon condition that the answer be also amended, he must show by affidavit wherein he would be misled by such amendment, and specify the nature of the further evidence it would render necessary. *Dunnigan v. Crummey*, 44 *Barb.* 528.

35. The party desiring to amend shall serve an engrossed copy of the pleading, with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where the amendment is to be inserted, together with the notice of application to amend. (*Cal. Pr. Act*, § 43; *San Fran. District Ct. Rule* No. 15.) So, when plaintiff is allowed, until plaintiff elects upon which count of the complaint he will go to trial, the plaintiff should serve a copy of complaint with the notice of his election. *Wilson v. Cleaveland*, 30 *Cal.* 192.

36. In New York, the defendant in an action has the right to serve an amended answer within twenty days after the service of the original, and to include therein a new defense; and this without regard to the nature of the defense. (*McQueen v. Babcock*, 3 *Keyes*, 428.) Under the Code, it is the practice where a party amends

his pleadings, either of course, or after obtaining consent or leave, to serve a new pleading; and it supersedes the original. It is the practice, too, to designate it on its face as an amended complaint or answer, as the case may be; though it has been held that the omission so to designate it does not render it void. *Hurley v. Second Building Association*, 15 *Abb. Pr.* 205, *note*.

37. Where amendments are allowed without authority, a motion to strike them out can be made at any time. (*Church v. Syracuse Co.*, 32 *Conn.* 372.) As a general rule, a party cannot judge for himself of the sufficiency of a pleading, or of the materiality of an amendment, but must bring the question before the Court. (*Vanderbuilt v. Bleeker*, 4 *Abb. Pr.* 289.) But when an amended pleading, in which the amendments are clearly frivolous or immaterial, is served immediately before the circuit, and obviously for the mere purpose of delay, it may be disregarded. (*Id.*) Where the Court has allowed the plaintiff, after the defendant has filed a plea in abatement, to amend his writ and declaration to meet the case presented by the plea, the defendant, who has appeared for the purpose of pleading in abatement only, is thereby put out of court; and a judgment by default may be rendered against him if he fail to appear again and plead to the action. *Randolph v. Barrett*, 16 *Pet.* 138.

*No. 967.**Notice of Motion for Leave to Amend.*

[TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit herewith served, and on all the papers on file in this action, the undersigned will move the Court, at the court room thereof, at, on the day of, 18 . . , at o'clock in the noon, or as soon thereafter as counsel can be heard, for leave to amend his complaint herein, by the insertion of the following clause, to wit: [*here insert proposed amendment*], after the word "," on line of page thereof, and for such other or further relief as may be just.

[DATE]

[SIGNATURE.]

*No. 968.**Order Giving Leave to Amend.*

[TITLE.]

On reading and filing the affidavit of A. B., and the notice of this motion, and the proof of due service thereof, and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

IT IS HEREBY ORDERED, that the plaintiff have leave to amend his complaint, on file in this action, by inserting the following, to wit: [*here insert amendment*], after the word "," on line of page thereof.

[DATE]

[SIGNATURE.]

38. Statement in Order.—An order granting leave to amend generally, without specifying in what particular, is irregular. *Thompson v. Malone*, 13 *Rich. (S.C.) L.* 252.

No. 969.

Notice of Motion to Strike Out Irrelevant or Redundant Matter.

[TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit herewith served, and the pleadings on file in this action, the undersigned will move the Court, at the court room thereof, at, on the day of, 18.., at o'clock in the noon, or as soon thereafter as counsel can be heard, to strike out matter contained in the complaint [*or* answer] herein, from and after the word “,” on line of page, down to and including the word “,” on line of page, as irrelevant [*or* redundant]; and for such other relief as may be just, with costs.

[SIGNATURE.]

[DATE.]

39. Statement in Motion.—Motion to strike out must specifically point out the objectionable matter. (*People v. Empire G. and S. Mi. Co*, 33 *Cal.* 171.) Motions to strike out immaterial portions of pleadings are not parts of the judgment roll. They are no part of a record on appeal, unless made so by a statement. *Sutter v. San Francisco*, 36 *Cal.* 112.

*No. 970.**Order to Strike out Irrelevant or Redundant Matter.*

[TITLE.]

On reading and filing [*designate motion papers*], and on motion of G. H. for the defendant, and after hearing E. F., attorney for plaintiff, in opposition thereto:

IT IS ORDERED, that the matter contained in the complaint [*or answer*] in this action, from the word "," on line of page, down to and including the word "," on line of page be stricken out as redundant [*or irrelevant*].

[DATE.]

[SIGNATURES.]

39. Irrelevant Pleading Defined.—A pleading is irrelevant which has no substantial relation to the controversy between the parties to the action. (*Seward v. Miller*, 6 *How. Pr.* 313.) It includes prolixity or needless details of material matter. (See *Bank v. Kitching*, 11 *Abb. Pr.* 435; *Struver v. Ocean Ins. Co.*, 2 *Hill*, 476; 9 *Abb. Pr.* 23; *Russ v. Brooks*, 4 *E. D. Smith C. P. R.* 645; *Ross v. Harris*, 11 *Abb. Pr.* 446.) Matter contained in an amended complaint is not irrelevant or redundant to a cause of action set out in the original complaint in the same action. *Nevada County and Sacramento County Canal Co. v. Kidd*, 28 *Cal.* 673; see Vol. i., p. 139, *et seq.*

40. May be Stricken Out.—Redundant or irrelevant pleading may be objected to by motion, but not by demurrer. (*Kinyon v. Palmer*, 18 *Iowa*, 377.) A motion by the defendants to strike out certain portions of the plaintiff's complaint, as irrelevant and redundant, was granted, with leave also to the plaintiff "to amend his summons and complaint as he should be advised." The plaintiff thereupon amended his summons in pursuance of such leave, and at the same time gave notice of his election not to amend his complaint under the leave given. The defendants thereupon answered the complaint; and within twenty days after receiving such answer, the plaintiff served an

amended complaint. *Held*, that the plaintiff was entitled to amend the complaint again, of course, after defendants had thus answered. (*Ross v. Dinsmore*, 12 *Abb. Pr.* 4.) *It seems* that the right to move to strike out an answer for irrelevancy, and the right to demur to an answer for insufficiency, were not designed for the same purpose; and it is not optional with the plaintiff whether he will resort to a demurrer or to a motion to test the sufficiency of the answer. (*Littlejohn v. Greely*, 13 *Abb. Pr.* 311.) If irrelevancy is not palpable, it should not be stricken out, but demurrer will lie. (*Alfred v. Watkins*, 1 *Code R. (N.S.)* 343; *Struver v. Ocean Ins. Co.*, 9 *Abb. Pr.* 23; 2 *Hill*, 47; *Littlejohn v. Greely*, 13 *Abb. Pr.* 311; 22 *How. Pr.* 345; see, however, *Lee Bank v. Kitching*, 11 *Abb. Pr.* 439.) See, as to notice, (*Bailey v. Lane*, 13 *Abb. Pr.* 354;) as to pendency of motion, *Kellogg v. Baker*, 15 *Abb. Pr.* 286.

41. What may be Stricken Out.—Irrelevant matter from a complaint may be stricken out on motion. (*Green v. Palmer*, 15 *Cal.* 411; *Bowen v. Aubrey*, 22 *Id.* 566.) Immaterial matter. (*Larco v. Casaneuava*, 30 *Cal.* 560.) Averments of deraignments of title. (*Id.*; *Wilson v. Cleveland*, *Id.* 192.) Superfluous matter, when inserted by itself; (*Boles v. Cohen*, 15 *Cal.* 150;) such as the name of plaintiff's wife. (*Warner v. Steamship "Uncle Sam,"* 9 *Cal.* 697.) Every fact not essential to a claim or defense. (*Green v. Palmer*, 15 *Cal.* 411.) If a copy of written contract sued on be attached to the complaint, and the averments of the complaint put a false construction of law upon the terms of the contract, such averments may be stricken out. (*Stoddard v. Treadwell*, 26 *Cal.* 294.) Allegations in the complaint which are absurd or impossible may be stricken out. (*Sacramento Co. v. Bird*, 31 *Cal.* 66; see, further, Vol. i., pp. 139-142.) Where the facts stated in the complaint constitute a sufficient cause of action, other unnecessary matter may be stricken out, and demurrer will not lie. See Vol ii., p. 604.

No. 971.

Notice of Motion to Require Plaintiff to Elect Between Several Counts of Complaint, in Certain Cases.

[TITLE.]

[ADDRESS.]

Please take notice, that upon the pleadings on file in this action, and on an affidavit, of which a copy is herewith served, the undersigned will move the Court, at the court room thereof, at, on the day of, 18.., at o'clock in the noon, or as soon thereafter as counsel can be heard, that the plaintiff be compelled to elect between the cause of action stated in the first count and the cause of action stated in the second count in the complaint, and state which he will rely on; and that on such election the other be stricken out; or in default of so electing, then that the second stated cause of action be stricken out as redundant; and for such other or further relief as may be just, and for the costs of this motion.

[DATE.]

[SIGNATURE.]

42. Practice.—When the defendant is allowed time to answer until the plaintiff elects on which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint, with the notice of his election. *Wilson v. Cleaveland*, 30 *Cal.* 192.

No. 972.

Affidavit on Motion to Compel Plaintiff to Elect Between Several Counts of Complaint.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. I am the defendant in the above entitled action
[*or show in some way deponent's knowledge of the facts*].

II. That only one transaction of the nature mentioned in either of the alleged causes of action set forth in the complaint ever occurred between deponent and the plaintiff, and that the transactions mentioned in both of the said alleged causes of action are in fact one and the same.

[SIGNATURE.]

[*Jurat.*]

No. 973.

Notice of Motion to Set Aside Complaint for Variance from Summons.

[TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit herewith served, and on the pleadings on file in this action, the undersigned will move the Court, at the court room thereof, at, on the day of, 18.., at the opening of said Court on that day, or as soon thereafter as counsel can be heard, to set aside the complaint in this action as irregular, in that the demand of relief therein is not for the recovery of money only [*or in that the cause of action therein stated, if any, did not*

arise on contract], while the summons in this action contains a notice that the plaintiff will take judgment for a specified sum in case of failure to answer; or for such other relief as may be just, with the costs of the motion.

[SIGNATURES]

[DATE.]

NOTE.—In California this is not the practice.

No. 974.

Order Setting Aside Complaint for Variance from Summons.

[TITLE.]

I. On reading and filing [*designate motion papers*], and on motion of G.H., attorney for defendant, and on proof of due service of notice of this motion, no one appearing in opposition:

II. IT IS ORDERED that the complaint herein be set aside as irregular, with liberty to the plaintiff to amend his summons within days after service of a copy of this order, on payment of dollars costs to defendant; the complaint in such case to stand as served at the time of service of such amended summons.

[SIGNATURE.]

[DATE.]

42. Variance.—If the complaint does not conform to the summons, it is the complaint and not the summons which is irregular. (*Boughton v. Lapham*, 14 *How. Pr.* 360; *Tuttle v. Smith*, *Id.* 395; 6 *Abb. Pr.* 329; *Shafer v. Humphrey*, 15 *How. Pr.* 564; *Ridder v. Whitlock*, 12 *Id.* 208; *Davis v. Bates*, 6 *Abb. Pr.* 15; overruling *Voorhies v. Scofield*, 7 *How. Pr.* 51; *Hyde Park v. Teller*, 8 *Id.* 504.) In California, this would not be the rule, for here the complaint is the first and principal pleading in the action.

*No. 975.**Notice of Motion to Strike out Sham Answer.*

[TITLE.]

[ADDRESS.]

Take notice, that on the affidavit herewith served, and on the pleadings on file in this action, the undersigned will move the Court, at the court room thereof, at, on the day of, 18.., at o'clock in the noon, or as soon thereafter as counsel can be heard, to strike out the second defense in the answer herein as sham, and the third defense as irrelevant; or for such other relief as may be just, with costs.

[SIGNATURE.]

[DATE.]

43. Statement in Motion.—A plaintiff may, on one motion, ask: *First*, To strike out defenses as sham and irrelevant. *Second*, For judgment on a demurrer as frivolous. *Third*, To strike out irrelevant and redundant matter. *Fourth*, To have the allegations made definite and certain. (People v. McCumber, 15 How. Pr. 186; 18 N.Y. 315.) The proper mode of taking advantage of defect in an answer which improperly blends and defectively states matters set forth therein, is by motion to strike out either the whole or part of it. Kinney v. Miller, 25 Mo. 576.

*No. 976.**Notice of Motion to Strike out Irrelevant Answer.*

. [TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit, a copy of which is herewith served, and the pleadings on file in this action, the undersigned will move the Court, at the court room thereof, at, on the day of, 18.., at the hour of o'clock in the noon, or as soon thereafter as counsel can be heard, to strike out the answer herein as irrelevant; or for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

44. Ambiguous Answer.—If an answer is ambiguous, and does not sufficiently disclose the particulars of a transaction relied on as a defense, the plaintiff's remedy is by motion, under Section 160 of the Code of Procedure (N.Y.), to make the answer more definite and certain. He cannot accept the plea and go to trial upon it, and then interpose the objection for the first time that it is not sufficiently descriptive of the particulars relied on. (*Farmers' and Citizens' Bank v. Sherman*, 33 *N.Y.* 69.) In California, under Subd. 7 of Sec. 40 of the Practice Act, demurrer would lie in such a case.

45. Answer with Denials only.—In the following cases it has been decided that an answer consisting only of denials cannot be stricken out as sham. (*White v. Bennett*, 7 *How. Pr.* 59; *Winne v. Sickles*, 9 *Id.* 219; *Livingston v. Finkle*, 8 *Id.* 485; *Benedict v. Tanner*, 10 *Id.* 455; *Stiles v. Comstock*, 9 *Id.* 48; *Grant v. Power*, 12 *Id.* 500; *Goedell v. Robinson*, 1 *Abb. Pr.* 116; *Farmers' and Mechan. Bk. v. Smith*, 15 *How. Pr.* 329; *Grey v. Reader*, 12 *Id.* 371; *Caswell v. Bushnell*, 14 *Barb.* 395; 7 *How. Pr.* 17; *Mier v. Cartledge*, 8 *Barb.* 75; 2 *Code R.* 125; *Mussina v. Stillman*, 13 *Abb. Pr.* 93; *Sherman v. Bushnell*, 7 *How. Pr.* 171; *Davis v. Potter*, 4 *Id.* 155; 2 *Code R.* 99;

Gregory *v.* Wright, 11 *Abb. Pr.* 418.) It is now, however, decided that it may be stricken out. (People *v.* McCumber, 18 *N.Y.* 316; 15 *How. Pr.* 186; Corbett *v.* Eno, 13 *Abb. Pr.* 65; Elizabethport Manf. Co. *v.* Campbell, 13 *Abb. Pr.* 86; Lawrence *v.* Derby, 24 *How. Pr.* 134; Butterfield *v.* McComber, 22 *How. Pr.* 150; Conklin *v.* Vandervoot, 7 *How. Pr.* 483; Mier *v.* Cartledge, 4 *How. Pr.* 115.) Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is sham. If some of the denials are deemed good, and the others bad, he may move to strike out the latter. Answers consisting of denials which do not explicitly traverse the material allegations of the complaint we hold so far sham and irrelevant, within the meaning of the Statute. Gay *v.* Winter, 34 *Cal.* 153.

46. Discretion of Court.—An answer filed without leave, after time for answering has expired, but before default has been entered, is not a nullity but at most an irregularity, and the Court in its discretion may strike it out or retain it. (Bower *v.* Dickerson, 18 *Cal.* 420.) The motion in this case to strike out the answers because denying on information and belief, and for judgment on the complaint: *Held*, to be properly overruled. Comerford *v.* Dupuy, 17 *Cal.* 308.

47. Informal Answers.—Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts showing that they constitute valid claims against the plaintiff are sufficiently stated, the defenses ought not to be stricken out. (Wallace *v.* Bear River Water and Mining Co., 18 *Cal.* 461.) If the answer has the signature of the attorney of record and that of an associate attorney attached to it, the Court will not strike it out. The Court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority. (Wilson *v.* Cleaveland, 30 *Cal.* 192.) If an answer tends to constitute a defense, it is not irrelevant, however informal or inartificial. Wallace *v.* Bear Riv. Wat. and Min. Co., 18 *Cal.* 461; Gregory *v.* Wright, 11 *Abb. Pr.* 410; Doran *v.* Dinsmore, 33 *Barb.* 86; De Forest *v.* Baker, 1 *Abb. Pr.* (N.S.) 34.

46. Proceedings on Motion to Strike Out.—When plaintiff moves on affidavit to strike out a defense as “sham,” the affidavit of defendant that his defense is *bona fide* will defeat the motion. (Gostorfs

v. Taaffe, 18 *Cal.* 385; *Drum v. Whiting*, 9 *Id.* 422; *Beebe v. Marvin*, 17 *Abb. Pr.* 194; see *Wedderspoon v. Rogers*, 32 *Cal.* 569, where authorities are collected.) When, to resist a motion to strike out as a sham defense good on its face, admissions on the part of the plaintiff are positively sworn to, which are neither contradicted, qualified, or questioned, and which tend to sustain the defense, the motion should be denied. (*Hadden v. New York Silk Manufacturing Co.*, 1 *Daly*, 388.) If defendant fail to appear on hearing of motion to strike out his answer, he cannot complain of this disposition of the case. (*Webb v. Stevens*, 14 *Mo.* 418.) On motion to strike out as sham an answer of joint defendants, where it appears that some of the defendants may have a valid defense, they may be permitted to serve an amended answer, which would be denied to the other defendants who show no merits. (*Burrall v. Bowen*, 21 *How. Pr.* 378.) As to proceedings on motion to strike it out, generally, see (*Grogan v. Ruckle*, 1 *Cal.* 193; *Kellogg v. Baker*, 15 *Abb. Pr.* 286.) On motion denied, (*Seward v. Miller*, 6 *How. Pr.* 312; *Miln v. Vose*, 4 *Sand.* 660.) On motion granted, (*Aymar v. Chase*, 1 *Code R. (N.S.)* 141; *Burrall v. Bowen*, 21 *How. Pr.* 378.) On leave to file amended answer, *Massini v. Stillman*, 13 *Abb. Pr.* 93.

48. Sham Answer Defined.—A sham answer is one good in form, but false in fact, and not pleaded in good faith. It sets up new matter which is false. (*Piercy v. Sabin*, 10 *Cal.* 22; *Gostorfs v. Taaffe*, 18 *Cal.* 385; *Leach v. Boynton*, 3 *Abb. Pr.* 1; *Littlejohn v. Greely*, 22 *How. Pr.* 345.) A defense is a sham which is so clearly false as not to present any substantial issue. (*Brewster v. Bostwick*, 6 *Cow.* 34; *Oakly v. Devoe*, 12 *Wend.* 196; *Broome Co. Bank v. Lewis*, 18 *Wend.* 565; *The People v. McCumber*, 18 *N.Y.* 315, 323.) To sustain the motion, falsity and bad faith should both be established; (*Hadden v. N.Y. Silk Manf. Co.*, 1 *Daly*, 388; *Kellogg v. Baker*, 15 *Abb. Pr.* 286; *Lockwood v. Salhenger*, 18 *Abb. Pr.* 136;) as there is a distinction between a false answer and a frivolous answer. (*Hecker v. Mitchell*, 5 *Abb. Pr.* 455; *Hull v. Smith*, 8 *How. Pr.* 150; *Davis v. Potter*, 4 *How. Pr.* 155; 2 *Code R.* 99.) A false answer, not verified, is a sham answer. (*Brewster v. Bostwick*, 6 *Cow.* 34; *Stock v. Cotton*, 2 *E. D. Smith*, 398; *Oakley v. Devoe*, 12 *Wend.* 196; *Nichols v. Jones*, 6 *How. Pr.* 257; *Ostrom v. Bixby*, 9 *Id.* 57; *Brown v. Jemmison*, 1 *Code Rep. (N.S.)* 156; *Walker v. Hewitt*, 11 *How. Pr.* 398; *Hull v. Smith*, 8 *Id.* 150; *People v. McCumber*, 18 *N.Y.* 320; *Broome Co. Bk. v. Lewis*, 18 *Wend.* 565.) Sham pleading is the setting up of a defense which has not only no foundation in fact, but which, it is man-

ifest, was interposed for vexation or delay. *Hadden v. N.Y. Silk Manf. Co.*, 1 *Daly*, 388.

49. Sham Defense, how Tested.—Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is sham. (*Gay v. Winter*, 34 *Cal.* 152.) An answer will not be adjudged to be sham simply upon an affidavit that it is false, for this would be trying the merits of the defense upon affidavits. But the Court must be satisfied from an inspection of the pleading, or from circumstances brought to its knowledge, that the object of the pleader was to delay or annoy the plaintiff, or to trifle with the Court. (1 *East*, 237; 1 *Id.* 369; 3 *Taunt.* 339; 1 *Chitty R.* 424, and *note a.*; *Id.* 564, and *note a.*; 5 *Bar. & Ad.* 750, *note a.*; 6 *Cow.* 34; *Hadden v. N.Y. Silk Manf'g. Co.*, 1 *Daly*, 388.) To warrant striking out a pleading as frivolous, it must be clearly bad on inspection merely. (*Smith v. Mead*, 14 *Abb. Pr.* 262.) The right of a defendant to have the issues tried by a jury depends on the existence of a real issue, and the Court has power to try, on motion, the question whether there is a substantial issue, or only a sham and fictitious one. *The People v. McCumber*, 18 *N.Y. R.* 315, 323.

50. Sham Answers may be Stricken Out.—Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, or immaterial, may be stricken out, upon motion, upon such terms as the Court, in its discretion, may impose. (*Cal. Pr. Act*, § 50.) These provisions apply equally to mere denials of allegations of the complaint as to affirmative matter, and equally to verified as to unverified answers; (*The People v. McCumber*, 18 *N.Y. R.* 315, 323;) as the verification of an answer is no bar to the motion. (*Lawrence v. Derby*, 24 *How. Pr.* 133; 15 *Abb. Pr.* 346.) This principle was questioned in *Gostorfs v. Taaffe*, 18 *Cal.* 385.

51. Unverified Answers.—An answer unverified to a verified complaint may be stricken out on motion; (*Grogan v. Ruckle*, 1 *Cal.* 193;) for if the complaint is sworn to, a general denial in the answer admits all its material allegations. (*Pico v. Colimas*, 32 *Cal.* 578; *Landers v. Bolton*, 26 *Cal.* 393.) And, though the inability of counsel to obtain defendant's verification in time may be good ground for an extension of time to answer, yet it cannot avail in resisting a motion to

strike out, and for judgment after the answer is filed. (*Drum v. Whiting*, 9 *Cal.* 422.) But it was held that the objection should have been raised in the court below and been passed upon, and that plaintiff having rested his cause at the trial on the ground of want of an affidavit, he will not be permitted to say here for the first time that the answer does not in a proper form controvert the allegations of the complaint. (*Grogan v. Ruckle*, 1 *Cal.* 193.) To a complaint against three persons, upon a promissory note, executed under a firm name, one of the defendants answered, denying his liability, and that he was one of the firm by whom the note was executed. Neither of the pleadings were verified. When the cause came on for trial, plaintiff moved to strike out defendant's answer for want of verification; and, pending the motion, defendant asked leave to then verify the answer. The Court denied defendant's motion, and struck out the answer. *Held*, that the refusal by the Court to allow the verification was such an abuse of discretion as to amount to error. (*Lattimer v. Ryan*, 20 *Cal.* 628; see, further, Vol. ii., p. 669.) By verification of the complaint, the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange, by requiring a sworn answer. *Brooks v. Chilton*, 9 *Cal.* 640.

52. What may be Stricken out of Answer.—A denial of a legal conclusion. (*Curtis v. Richards*, 9 *Cal.* 33; *Wells v. McPike*, 21 *Id.* 215; *People v. Supervisors of San Francisco*, 27 *Cal.* 655; *Wedder- spoon v. Rogers*, 32 *Cal.* 569; *Seeley v. Engell*, 17 *Barb.* 530; *Catlin v. Gunter*, 1 *Duer.* 265; *Fleury v. Brown*, 9 *How. Pr.* 217; *Butterfield v. McComber*, 22 *How. Pr.* 150; see cases cited in Vol. ii., p. 660.) The denial of immaterial averments of the complaint. (See Vol. ii., p. 662.) So, a denial on want of any knowledge or information sufficient to form a belief, of matter presumptively within the knowledge of the defendant. (*Lawrence v. Derby*, 15 *Abb. Pr.* 346; 24 *How. Pr.* 134; *Beebe v. Marvin*, 17 *Abb. Pr.* 194.) A defense of agreement, contemporaneous with making of note, to renew it at maturity. (*Bailey v. Lane*, 13 *Abb. Pr.* 359; 21 *How. Pr.* 475; *Shoe and Leather Bank v. Camp*, 21 *How. Pr.* 443.) What matters may be struck out of an answer as scandalous, immaterial, etc., see (*Griswold v. Hill*, 1 *Paine*, 390; *Langdon v. Goddard*, 3 *Story C. Ct.* 13; *Sargent v. Larned*, 2 *Curt. C. Ct.* 348.) An objection which ought to have been taken by demurrer, but is taken only by allegation in the answer, should be stricken out. (*Gassett v. Crocker*, 10 *Abb. Pr.* 133.) *The objection* that the allegations of an answer are *hypothetical* is not available on de-

murrer (1 *E. D. Smith*, 553; 9 *How. Pr.* 543; *Taylor v. Richards*, 9 *Bosw.* 679), but on motion to strike out. So, the unessential parts of an answer may be stricken out; (*Green v. Palmer*, 15 *Cal.* 411; *Klink v. Cohen*, 13 *Cal.* 623;) or the denial of what is non-essential in the complaint, for this is an admission of all that is essential to a recovery. (*Leffingwell v. Griffing*, 31 *Cal.* 231.) If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer; and if no objection be taken to the answer on this ground, defendant on the trial may rely on any of his defenses, as under the old system. *Klink v. Cohen*, 13 *Cal.* 623; *Uridias v. Morrill* (No. 2), 25 *Cal.* 35; *Holm v. Roach*, 25 *Cal.* 37.

53. When Motion Should be Made.—An answer cannot be stricken out after issue joined. If an answer is filed, raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the Court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint. (*Abbott v. Douglass*, 28 *Cal.* 295.) Where certain material averments of the plaintiff's complaint were so defectively denied that, upon motion, such denials might properly have been stricken out as sham and irrelevant, yet without such objection made thereto, the plaintiff introduced proof at the trial in their support. *Held*, that by introducing said proof the plaintiff waived all objection to the sufficiency of said denials, and the Court properly refused an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of said trial. (*Tynan v. Walker*, 35 *Cal.* 634.) Where party sets up matter in his answer not recognized by law as a defense to the action, it may be taken advantage of at any time. (*Case v. Maxey*, 6 *Cal.* 276; *McDougall v. Maguire*, *Cal. Sup. Ct., Apl. T.*, 1868.) If the defendant files his answer at the same time he does his demurrer, the Court, after overruling the demurrer, has no right to strike out an answer which raises a defense, because the defendant fails to pay the plaintiff twenty dollars, required by a rule of court to be paid for the privilege of answering when a demurrer is overruled. *People v. McClellan*, 31 *Cal.* 101.

*No. 977.**Order Striking out Irrelevant Answer.*

[TITLE.]

On reading and filing [*designate motion papers*], and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

IT IS ORDERED, that the answer of C. D., the defendant in this action, be stricken out as irrelevant, with
 dollars costs to plaintiff.

[SIGNATURE.]

[DATE.]

52. Order not Appealable.—Orders striking out immaterial portions of pleadings, and orders sustaining demurrers, are not appealable. *Sutter v. San Francisco*, 36 *Cal.* 112; *Briggs v. Bergen*, 23 *N.Y.* 162.

*No. 978.**Notice of Motion for Leave to Correct Fictitious Name.*

[TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit herewith served, and on all the proceedings on file in this action, the undersigned will move this Court, at the court room thereof, at, on the day of, 18.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to amend his complaint, by substituting the name of, as the real name of the [defendant] in this action, wherever

the name John Doe occurs in the papers filed in this action; or for such other relief as may be just.

[DATE.]

[SIGNATURE.]

NOTE.—As a general rule, this is done by the suggestion of the true name, and its substitution in the place of the fictitious one.

No. 979.

Affidavit to Obtain Leave to Correct Fictitious Name.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above entitled action.

II. I was not acquainted with the real name of the defendant therein until after the commencement of this action, and about days ago.

III. That the defendant was sued in said action under the fictitious name of, and that his real name is

[SIGNATURE.]

[*Furat.*]

55. Mistakes.—Mistakes in names of parties on writ may be amended as a clerical misprision, even after the adjournment of the term, but the record itself must show the error. (*Hegeler v. Henckel*, 27 Cal. 491; *Furniss v. Ellis*, 1 Brock. Marsh. 15; *Elliot v. Holmes*, 1 McLean, 466; *Breeze*, 19; 34 Barb. 208; 12 Wis. 319.) But where there is a mistake in the christian name of one of the plaintiffs throughout the proceedings, the Court cannot amend the judgment upon evidence *aliunde*. (*Albers v. Whiting*, 1 Story C. Ct. 310; 13 Ill. 571; 3 Scam. 93; 32 Ill. 331; 35 Id. 265; but see 27 Id. 39.) A declaration in the name of a firm may be amended by inserting the names of the

members of the firm. (*Tibbs v. Parrott*, 1 *Cranch C. Ct.* 177.) A corporate name may be substituted for an individual name. (32 *Ill.* 331.) Leave was granted to correct the corporate name of the plaintiff. *Corporation of Georgetown v. Beatty*, 1 *Cranch C. Ct.* 234.

56. Variance.—A formal variance, in suing a defendant by a wrong name, is amendable at any time. (*Scull v. Bridle*, 2 *Wash., C. Ct.* 200; *Craig v. Brown*, *Pet. C. Ct.* 139.) On a plea of misnomer, the Court may allow the plaintiff to amend the writ and declaration. (16 *Pet.* 141; *Nelson v. Barker*, 3 *McLean*, 379.) Leave to amend the writ by changing the name of one of the plaintiffs was refused. *Comegys v. Robb*, 2 *Cranch C. Ct.* 141.

No. 980.

Order Giving Leave to Correct Fictitious Name.

[TITLE.]

On reading and filing the affidavit of A. B., and the notice of this motion, with proof of due service thereof, and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

IT IS ORDERED, that the name of be substituted in the place of, as the real name of the defendant in this cause.

[SIGNATURE.]

[DATE.]

No. 981.

Notice of Motion to Amend Complaint by Adding Defendant.

[TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit herewith served, and on all the proceedings on file in this action, the undersigned will move the Court, at the court room

thereof, at, on the day of, 18 . . ., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the plaintiff may have leave to amend his summons and complaint in this action, by adding L. M. as a defendant therein, with proper words to charge him, and for such other and further relief as may be just.

[SIGNATURE.]

[DATE.]

No. 982.

Order of Court Granting Leave to Amend.

[TITLE.]

On motion of E. F., attorney for the plaintiff in this action, notice thereof being duly served on the defendant's counsel, and after hearing thereon, it is hereby ordered that plaintiff have leave to amend his complaint filed herein.

No. 983.

The Same—By Striking Out and Making New Parties.

I. [*Insert as in previous form.*]

II. By striking out E. B. and E. D. from being plaintiffs, and by making them defendants in said action; *or* by adding E. F. as a defendant herein; *or* by substituting the name of Christian Doe as the real name of the defendant, instead of Charles Doe, whenever the same occurs in said complaint.

58. Adding or Striking Out Parties.—The Court may, in furtherance of justice, and on such terms as may be proper, amend any pleading, by adding or striking out parties. (*Cal. Pr. Act*, § 68; 3

Scam. 45; 32 *Ill.* 331; 35 *Ill.* 22.) The Court will take notice of the want of necessary parties, and will ordinarily allow an amendment on just terms. *Beals v. Cobb*, 51 *Maine*, 348.

59. Discretion.—When the Court perceives that necessary and indispensable parties are wanting (1 *Pet. U.S.* 299), it may grant leave to amend and bring them in (*Cal. Pr. Act*, § 68; 4 *Wash.* 202; 3 *McLean*, 104), in its discretion (4 *Paige*, 75; 7 *Barb.* 221; 1 *Pet. U.S.* 138), and on such terms as may be prescribed. (*Cal. Pr. Act*, § 68; *Vanderwerker v. Vanderwerker*, 7 *Barb.* 221.) But such an amendment cannot be made without leave of court. (*Rand v. Spear*, 5 *How. U.S.* 142; *Id.* 99.) But it has been held that an entire change of parties cannot be allowed on amendment. (*Wright v. Storms*, 3 *N.Y. Code R.* 138; 10 *How. Pr.* 141; *Id.* 163; 3 *Seld.* 459; 5 *How. Pr.* 440; 1 *Code R.* 27; 7 *Barb.* 221; *Johnson v. Snyder*, 8 *How. Pr.* 498; 9 *Barb.* 202.) The Court may refuse to allow an amendment striking out the name of a wife. *Moore v. Carter*, *Hempst.* 64.

60. Motion, when Made.—Parties may be added to or stricken from pleadings at any time, on terms. By adding parties plaintiff. (See *Dutcher v. Slack*, 3 *How. Pr.* 322.) Or defendants. (*Genesee Valley R.R. v. Beckwith*, 10 *How. Pr.* 163.) Or by striking out parties defendant. (See *Cuyler v. Coats*, 10 *How. Pr.* 141; *Brown v. Babcock*, 3 *How. Pr.* 305; *Bemis v. Bronson*, 1 *C. R.* 27.) But whether, after striking out a party from the pleadings, the Court can reinstate him, *query*, (*Beach v. Covillaud*, 2 *Cal.* 237; *Thompson v. Kessell*, 30 *N.Y.* 383.) On motion for nonsuit at the trial, plaintiff may be allowed to amend complaint by adding the name of a co-plaintiff, on such terms as may be just; (1 *Van Santv.* 134; 1 *Pet. U.S. R.* 299; *Acquital v. Crowell*, 1 *Cal.* 191; *Heath v. Lent*, *Id.* 412; *Farmer v. Cram*, 7 *Id.* 135; *Polk v. Coffin*, 9 *Id.* 56; *Horn v. Volcano Wat. Co.*, 13 *Cal.* 62; *Brown v. Davis*, 15 *Cal.* 9; *Gavit v. Doub*, 23 *Id.* 78; *Valencia v. Couch*, 32 *Id.* 340;) even after the close of plaintiff's testimony. (*Polk v. Coffin*, 9 *Cal.* 56; *Hurley v. Second Building Ass'n*, 15 *Abb. Pr.* 206.) The Court may at any time allow an amendment by inserting the name of a firm, where an action is brought in the name of one partner only. *Dixon v. Dixon*, 19 *Iowa*, 512.

61. Special Cases.—In an action of *assumpsit* against two defendants tried by the Court, the plaintiff, after a verdict against him upon the ground that a joint promise was not proved, cannot amend by striking

out one of the defendants. (*Griffin v. Simpson*, 45 *N.H.* 18.) A suit may be amended by inserting the name of a co-partner of the firm. (*Stuart v. Corning*, 32 *Conn.* 105.) In suit by a sheriff, for the use of execution-creditors, the complaint may be amended by adding other execution-creditors. (*Glenn v. Black*, 31 *Ga.* 393.) In ejectment, complaint may be amended by making new parties plaintiff. (15 *Ill.* 427.) Or judgment-creditors, as subsequent incumbrancers, may be made parties to the action. (*Horn v. Volcano Wat. Co.*, 13 *Cal.* 62.) As to effect of adding new parties, see (*Hurley v. Second Building Ass'n*, 15 *Abb. Pr.* 206; *Elmore v. Vallette*, 16 *Abb. Pr.* 249; *Cheeseman v. Storgis*, 9 *Bosw.* 246.) Leave to amend, making new parties in an action on a note, was refused. (*Morris v. Barnes*, 1 *Cranch C. Ct.* 245.) In a suit on a foreclosure of mortgage, the complaint may be amended by making the original vendor a party defendant. *Roddy v. Elam*, 12 *Rich. Eq.* 343.

62. Striking out Parties.—The misjoinder of parties may be corrected by amendment. (*Heath v. Lent*, 1 *Cal.* 410; *Beach v. Covillaud*, 2 *Cal.* 237.) Such amendment may be made so as to exclude parties irregularly included; (*Mulliken v. Hull*, 5 *Cal.* 245;) even after judgment rendered. (*Browner v. Davis*, 15 *Cal.* 9.) Plaintiffs may be allowed to amend before trial by striking out the name of one of the defendants. (*Bell v. Davis*, 3 *Cranch C. Ct.* 4; *Tobey v. Chafflin*, 3 *Sumn.* 379.) The Court may allow an amendment of a complaint striking out the name of a plaintiff who was dead at the commencement of the suit. *Jennison v. Smith*, 37 *Ala.* 185.

CHAPTER V.

SUBSTITUTION OF PARTIES, AND CONTINUANCE OF CAUSE.

No. 984.

*Petition by Assignee of Plaintiff's Title to Continue Cause in his
Own Name.*

[NAME OF COURT.]

In the Matter of the Petition of E. F. to continue in his own name an action pending in this Court between said A. B., Plaintiff, and one C. D., Defendant.	}
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

The petition of E. F. respectfully shows the Court:

I. That on or about the day of, 18.., one A. B. commenced an action in this Court against one C. D. for [*here state the cause of action*]; that issue was joined therein by the service and filing of the defendant's answer on the day of, 18..; that said cause is upon the calendar of this Court awaiting trial.

II. That on the day of, 18.., and while said action was still pending, said A. B., plaintiff in said action, duly assigned and transferred the [promissory note] in the complaint mentioned, for a valuable consideration, to your petitioner.

WHEREFORE your petitioner prays that he may be substituted as plaintiff in said action in place of said

A. B., and that said action may be continued in his name, and that he may have such other relief as may be just.

[SIGNATURE.]

[*Verification.*]

NOTE.—The notice in this matter should present briefly what the petition demands.

1. Transfer of Interest.—Section one hundred and twenty-one of the Code, which provides that in case of a transfer of interest the action shall be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action, contemplates a transfer other than by death—contemplates an existing, pending action, and the substitution of one person in the place of another. (*Kissam v. Hamilton*, 20 *How. Pr.* 367.) After the issues in a cause are all made up, a person claiming to be assignee of a cause of action may be substituted as plaintiff, and if so substituted need not file a supplemental complaint. (*Virgin v. Brubaker*, 4 *Nev.* 31.) He takes the place of the original plaintiff, who ceases to be a party to the suit. (*Id.*) Where a person claiming to be assignee of a cause of action is substituted as plaintiff, and the cause proceeds and a judgment is rendered in his name, it is too late to object in the appellate court that he did not file a supplemental complaint showing his interest. *Virgin v. Brubaker*, 4 *Nev.* 31.

No. 985.

*Petition after Marriage of Female Plaintiff to Continue Cause in
Joint Names of Husband and Wife.*

[NAME OF COURT.]

In the Matter of the Petition of A.
B. and E. F. to continue in
joint names an action pending
in this Court between said A.B.,
Plaintiff, and C. D., Defendant.

I. [*As in Form* 985.]

II. That pending said action, and on the day of
., 18 . . ., your petitioner A. B. was married to
your petitioner E. F. above named, who thereby be-
came, and now is, a necessary party plaintiff herein,
as your petitioners are advised and believe.

Wherefore your petitioners pray the order of this
Court that said action may be continued by your peti-
tioners jointly as plaintiffs, against said C. D., and that
your petitioners may have leave to amend the complaint
as they may be advised, and such other relief as may
be just.

[SIGNATURE.]

[DATE.]

[*Verification.*]

NOTE.—In the practice, where the names of the parties to an action have to be changed, it is usually done by suggestion or stipulation only, for in the case of the death of one of the parties, or marriage of one of them, the labor of drawing up formal affidavits and petitions is by our practice generally dispensed with.

No. 986.

*Notice of Motion for Leave to Continue Action in the Name of
Administrator.*

[TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit, a copy of which is herewith served, and on the pleadings on file in this action, P. Q., as administrator of the estate of the plaintiff, will move the Court, at the court room thereof, at, on the day of, 18 . . . , at o'clock in the noon, or as soon thereafter as counsel can be heard, for leave to continue this action in the name of the said administrator as plaintiff, or for such other or further relief as may be just.

[DATE.]

[SIGNATURE.]

Attorney for P. Q., Administrator.

NOTE.—As stated in last note, in California, on the death of a party, the substitution of the personal representative is always done by suggestion of the death. (See *Cal. Pr. Act*, § 16; see, also, *Gee v. Moore*, 14 *Cal.* 472; *Black v. Shaw*, 20 *Cal.* 68; *Gregory v. Haynes*, 21 *Cal.* 44; *Ewald v. Corbett*, 32 *Cal.* 493; see Vol. ii., p. 711, *et seq.*

No. 987.

*Order by Consent Substituting Administrator as Plaintiff, without
Prejudice to Proceedings.*

[TITLE.]

On reading and filing the affidavit of E. F., showing the death of A. B., the plaintiff in the above entitled action, and the granting of letters of administration to

P. Q., by the Probate Court of the County of, and on motion of E. F., the plaintiff's attorney, the defendant's attorney consenting thereto:

IT IS ORDERED, that this action be, and the same is hereby revived and continued in the name of the said P. Q., administrator of the estate of A. B., deceased, as plaintiff; and that the said administrator be, and he is hereby substituted as plaintiff in the place and stead of the said A. B., deceased, and that such revivor and continuance be without prejudice to any of the proceedings already had in this action.

[SIGNATURE.]

[DATE.]

1. Death of Wife.—The death of the wife, after suit brought by herself and husband for the homestead, defeats a recovery by the husband, though the right to recover existed at the commencement of the suit. *Gee v. Moore*, 14 *Cal.* 472.

2. Form.—Petition, consent, and order for the substitution as plaintiff of the successor in trust of a deceased plaintiff, *Emerson v. Bleakley*, 5 *Abb. Pr. (N.S.)* 350.

3. Partition.—In a suit in chancery for partition, one of the defendants died after the bill had been taken as confessed as against him. The suit was prosecuted to judgment without bringing in his heirs (who were not parties to the suit), and after sale under the judgment and delivery of the master's deed, an order was made reviving the suit against his heirs, who thereafter made application to the Court in relation to the disposition of the proceeds. *Held*, That the heirs were not bound by the decree. By the death of their ancestor the action became defective, and the title which he had at the time of his death could not be affected without bringing in those who succeeded to his interests. (*Russell v. Sharp*, 1 *Ves. & B.* 500; *Randall v. Mumford*, 18 *Ves.* 424; *Story's Eq. Pl.* §§ 329, 331, 354, 369; *Hind's Ch. Pr.* 46; 1 *R. L.* 514, 488; *Washington Ins. Co. v. Slee*, 1 *Paige*, 365; *Kelly v. Hooper*, 3 *Ferg.* 395; *Garr v. Gomez*, 9 *Wend.* 649; 2 *Pet.* 482, 487; *Vroom v. Dittmas*, 3 *Paige*, 828; *Williams v. Kinder*, 4 *Ves. Sr.* 487.

4. Practice.—The death of a party, *pendente lite*, should be made known by suggestion of that fact to the Court, and the action continued by order of the Court against the representative of the party deceased, of which he must be duly notified before he can be affected by further proceedings in the action. (*Judson v. Love*, 35 Cal. 463.) Where, in an action by J. against L. and others, L. died after verdict rendered for defendants, and thereafter J. moved for a new trial, without suggestion made of the death of L., or a substitute of his successor in interest, and appealed from the judgment rendered on the verdict, and an order denying a new trial: *Held*, that all said proceedings, except the rendition of judgment upon said verdict, were void, and that the appeal as to L. should be dismissed. (*Judson v. Love*, 35 Cal. 463.) Where a party litigant dies after a verdict, the authority of the attorney to act for him is thereby determined, and he can neither give nor receive notice of motion for new trial or appeal. *Judson v. Love*, 35 Cal. 463.

No. 988.

Order Continuing Action in Name of Executor.

[TITLE.]

On reading and filing the petition of S. T. duly verified, and affidavit of E. F., and the pleadings in this action, and the proof of due service of notice of the motion, and on motion of G. H. counsel for defendant, after hearing J. R. counsel for P. Q.:

IT IS ORDERED, that the above entitled action be continued in the name of, as executor of A. B., plaintiff above named.

5. Order Conclusive.—An order of revivor, in the name of A. "as executor" of a deceased plaintiff, standing in full force at the time of the trial, is conclusive to show that the action has been properly revived, and that A. can recover all that the testator might have recovered. *Underhill v. Crawford*, 29 Barb. 664; 18 How. Pr. 112.

No. 989.

Petition by Defendant to have Action Continued when Plaintiff has Died, and the Action has not been Revived.

[TITLE.]

The petition of S. T., defendant above named, shows to this court:

I. That on or about the day of, 18.., the above named A. B. commenced an action in this Court against this defendant, for [*state cause of the action and condition, as in Form 985*].

II. That your petitioner is informed and believes that A. B., the above named plaintiff, died on or about the day of last, having first made and published his last will and testament in due form of law, by which, among other things, he appointed P. Q. his executor; that said will has been duly admitted to probate in the Probate Court of the County of, and letters testamentary issued to the said P. Q., on the day of, A.D. 18.., and he has duly qualified and entered upon his duties as such executor, but, to the best of your petitioner's information and belief, has hitherto failed to make any application to have the above entitled action continued by him as plaintiff.

Wherefore your petitioner prays that the above entitled action may be continued in his name, or that the complaint herein be dismissed, so far as the interests of said estate are concerned, and that your petitioner have judgment thereupon against the said P. Q., as executor as aforesaid, for the costs of such action; or for such other order as may be just.

[SIGNATURE.]

[Verification.]

*No. 990.**Order for Continuance.*

[TITLE.]

On reading and filing the petition of, and affidavit of J. R., dated the day of, and the pleadings in this action, and proof of due service of notice of this motion, and on motion of S. T., counsel for said P. Q., executor [*or administrator*] of the plaintiff, deceased, and after hearing G. H., of counsel for the defendant:

IT IS ORDERED, that P. Q. be substituted as plaintiff herein, in the place of A. B., plaintiff above named, and that the above entitled action be continued by him as executor [*or otherwise*] of said A. B., and that he be allowed to amend his complaint accordingly.

*No. 991.**Notice of Motion to Declare Action Dismissed unless the Proper Parties Revive It.*

[TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit of which a copy is herewith served, and the pleadings on file in this cause, the undersigned will move the Court, at the court room thereof, at, on the day of, 18 . . ., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, to require this action to be revived and continued by the executor of the above named A. B., deceased, as plaintiff herein, within a time to be fixed by the Court, or that, in de-

fault thereof, the action shall be deemed dismissed; or for such other relief as may be just.

[SIGNATURE.]

[DATE.]

No. 992.

Affidavit on Motion to Continue Action in Name of Executor, or in Default to Dismiss Cause.

[TITLE.]

[VENUE.]

S. T., being duly sworn, says as follows:

I. That he is the defendant in the above entitled action.

II. That this action is brought to recover [*state object of action, and condition*].

III. That, as deponent is informed and believes, on the day of, 18.., and after issue was joined in this action, the above named plaintiff died, having first made and published his last will and testament in due form of law, by which he appointed P. Q., of, his executor.

IV. That said will and testament was duly admitted to probate in the Probate Court of the County of, and letters testamentary duly made and issued by the said Court to the said P. Q., on the day of, 18.., and that the said P. Q. has accepted the same, and entered upon the duties of his office.

[SIGNATURE.]

[*Jurat.*]

No. 993.

*Notice of Motion on Behalf of Plaintiff to Continue Action on Death
or Disability of Defendant.*

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit, a copy of which is herewith served, and the papers on file in this cause, the undersigned will move the Court, at the court room thereof, at, on the day of, 18 . . ., at the hour of . . . in the forenoon, or as soon thereafter as counsel can be heard, for an order directing the above entitled action to be continued against P. Q., as executor of the last will and testament of [*or* administrator of the estate of] C.D., defendant above named, deceased, in the place of said deceased defendant, and granting leave to this plaintiff to amend the complaint herein as he shall be advised; and for such other relief as may be just.

[DATE.]

[SIGNATURE.]

• SUBSTITUTION OF PAPERS.

No. 994.

Affidavit for Supplying the Place of a Lost Pleading.

[TITLE.]

[VENUE.]

I. On the day of, 18 . . ., a complaint was filed in the above named Court, in this action, of which the following is a true copy.

II. That the said original complaint has been lost or mislaid, and that, after a search made by the Clerk of the said Court, the same cannot be found.

III. That this affiant does not know where the said original complaint now is.

1. Lost Pleading.—If a pleading be lost, it can only be supplied by motion based on affidavits showing what the lost pleading contained, and a service of personal notice of motion on the opposite party must be sufficiently explicit in form to enable him to controvert the affidavits submitted. *People v. Cozalis*, 27 *Cal.* 522.

2. Substitution of Pleadings.—Substitution of pleadings or papers in a case is always within the discretion of the Court. (*Benedict v. Cozzens*, 4 *Cal.* 381.) And no notice of the motion to apply for it need be given, when the notice of it can be of no use. (*Benedict v. Cozzens*, 4 *Cal.* 381.)

CHAPTER VI.

INTERVENTION.

No. 995.

Order to Bring in Necessary Parties, without Motion.

[TITLE.]

I. This cause coming on to be tried, and it appearing to the Court that S. T. is a necessary party to a complete determination of the controversy:

II. IT IS ORDERED, that the summons and complaint in this action be amended by the addition of S. T. as a defendant therein; that the plaintiff cause the said S. T. to be duly served with a copy of the said summons and complaint, further amended as he may be advised, within days from the date of this order; that the said S. T. have days to answer the complaint, after such service; and that the trial of this cause be postponed until the expiration of said days allowed the said S. T. to answer as aforesaid.

1. Court may Order.—When a complete determination of the controversy cannot be had without the presence of other parties, the Court shall order them to be brought in. (*Cal. Pr. Act*, § 17; *Oregon*, § 40; *Iowa*, § 2,765; *N.Y.* § 122; 1 *Van Santv. Eq. Pr.* p. 121.) The Court may, on its own motion, order necessary parties to be brought in. (*Settembre v. Putnam*, 30 *Cal.* 490.) But not against the will of the plaintiff, unless their presence is necessary. (*Sawyer v. Chambers*, 11 *Abb. Pr.* 119.) The order may be made at any stage of the action.

(State of N.Y. v. Mayor of N.Y., 3 *Duer*, 121; Caswell v. Neville, 12 *How. Pr.* 445.) In New York, this Section is confined to actions for the recovery of real or of specific personal property. Tallman v. Hollister, 9 *How. Pr.* 79; Judd v. Young, 7 *How. Pr.* 79; compare Osborne v. Betts, 8 *Id.* 31.) The phrase "when a complete determination, etc.," means that there are persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. (McMahon v. Allen, 12 *How. Pr.* 39.) As a court of equity will not permit litigation by piecemeal, and as the whole subject matter and all the parties should be before it, to determine once and forever their respective claims, the Court will order them to be brought in. (Wilson v. Lassen, 5 *Cal.* 114; Ord v. McKee, *Id.* 515; Shaver v. Brainard, 29 *Barb.* 25.) And it is the imperative duty of the Court in such case to order the parties in; (Tonnelles v. Hall, 3 *Abb. Pr.* 205; Waring v. Waring, 3 *Abb. Pr.* 246; Davis v. Mayor of N.Y., 2 *Duer*, 663; Shaver v. Brainard, 29 *Barb.* 25;) although such parties be non-residents. Sturtevant v. Brewer, 17 *How. Pr.* 571; 9 *Abb. Pr.* 414; see Grain v. Aldrich, *Cal. Sup. Ct., Oct. T.*, 1869.

No. 996.

Notice of Motion to Allow Party to Interplead.

[TITLE.]

Take notice, that on the affidavit herewith served, and on the complaint herein, the defendant will move the Court, at the Court Room thereof, at, on the day of, 18.., at . . . o'clock in the noon, or as soon thereafter as counsel can be heard, to substitute M. N., of, in his place, as defendant herein, and to discharge this defendant from liability to either the plaintiff or the said M. N., concerning [*designate the contract*] mentioned in the complaint, upon this defendant's paying into court the sum of dollars, the amount claimed in the summons herein [*or, if the action is for specific property, say, concerning the property mentioned in the complaint,*

upon said defendant's transferring the same to such person as the Court may direct]; or for such other relief as may be just.

[DATE.]

[SIGNATURE.]

No. 997.

Affidavit in Action to Recover Money.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above entitled action.

II. That the said action has been commenced and is now pending in this Court, against the above named defendant, on a contract; and that the said defendant has not yet answered therein, and his time to do so does not expire until the day of next.

III. That said action is brought to recover the sum of dollars, deposited with said defendant on or about the day of, 18.., by one A. B.; and that the plaintiff claims to be entitled to said moneys so deposited, under an assignment thereof to him by the said A. B.

IV. That on the day of, 18.., one M. N. gave to said defendant notice that the said moneys had been assigned to him, A. B., and demanded of said defendant that they pay the said deposit to him; which demand was made without any collusion with the defendant. And this deponent further says that he is not acquainted with the respective merits of said claims,

and does not know to which of said parties he can safely pay said money; but hereby offers to pay the same into court, upon being discharged from liability to either of them, in order that said several claimants may interplead, and settle their claims between themselves.

[*Jurat.*]

[SIGNATURE.]

No. 998.

Affidavit where Action is Brought to Recover Specific Personal Property.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above entitled action.

II. That the complaint therein was served on him on the day of, 18.., at, and no answer has yet been filed.

III. That the property which is claimed by the complaint herein was delivered to this deponent for storage by one O. P., of, subject to his order.

IV. That the same property is claimed by one Q. R., of, under a written order of the said O. P., dated on the day of, 18.., and directing its delivery to him as the alleged purchaser thereof; while the plaintiff herein claims under a general assignment of all the property of the said O. P. to him, executed by the said O. P. on the same day.

V. That the defendant is ignorant of the rights of the respective claimants, and is not acting in collusion with either of them.

VI. That the defendant is ready and willing to deliver the said property to such person as the Court may direct, upon being discharged from liability to either of the said claimants.

[SIGNATURE.]

[*Jurat.*]

1. Disclaimer and Interpleader.—A defendant against whom an action is pending upon a contract, or for specific personal property, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract or for the same property, upon due notice to such person and the adverse party, may apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the Court may direct; and the Court may, in its discretion, make the order. (*Cal. Pr. Act*, § 658.) Where several persons conspire to obtain the land of plaintiffs, and in suit against them to recover the property two of the defendants disclaim all interest therein: *Held*, to be no ground for dismissing the suit as to them, as they were proper parties and are liable for costs. *Dupuy v. Leavenworth*, 17 *Cal.* 262.

No. 999.

Oath Denying Collusion—to Annex to a Bill of Interpleader.

That he does not bring this action by the consent, knowledge, privity, or combination of any or either of the defendants in this action, but only of his own free will, for relief in this Court.

2. Tenants.—Where a tenant finds that there are claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into court, to abide the ultimate decision of the case. *McDevitt v. Sullivan*, 8 *Cal.* 592.

*No. 1000.**Order of Interpleader.*

On reading and filing the affidavit of C. D., and upon proof of due service of notice of this motion, and on motion of G. H. for C. D., and after hearing E. F. in opposition:

IT IS ORDERED, that on payment by the defendant to the Clerk of the County of of the amount claimed in the summons herein, principal and interest, within five days from the date of this order, Q. R. be substituted as defendant in this action in place of C. D., the defendant above named, and that said C. D. thereupon be discharged from liability to either the plaintiff above named or said Q. R. And it is further ordered, that if the said Q. R. does not appear and defend this action within days after service upon him of a copy of this order, together with a copy of the summons and complaint herein, the plaintiff may apply for an order that the money so deposited be paid over to him.

No. 1001.

Petition by Landlord to be made Defendant in Action of Ejectment.

[TITLE.]

The petition of M. N. respectfully shows to this Court:

I. That an action is now pending in this Court by A. B., plaintiff, against C. D., defendant, for the recovery of the possession of certain real property, situated in the County of, and more particularly described in the complaint in said action; which action

your petitioner is informed and believes is at issue, and upon the calendar of this Court, awaiting trial.

II. That said C. D. occupies said premises as tenant of your petitioner, and not otherwise. That your petitioner claims in good faith to be the owner in fee simple of said premises [*here briefly indicate title*].

Wherefore your petitioner prays that he may be made a party defendant in said action, and may be allowed to defend the same, and that he may have such other relief as may be just.

[SIGNATURE.]

[DATE.]

[*Verification.*]

No. 1002.

Notice of Motion to make Party Defendant.

[TITLE.]

[ADDRESS.]

Please take notice, that on the annexed petition, and on the papers on file in this action, the undersigned will move the Court, at the court room thereof, at, on the day of, 18 . . , at o'clock in the noon, or as soon thereafter as counsel can be heard, for an order, under Section of the Practice Act, directing A.B., the petitioner above named, to be made a party defendant in the action now pending in this Court between A. B., plaintiff, and C. D., defendant, and for such other relief as may be just.

[DATE.]

[SIGNATURE.]

*No. 1003.**Order Making Third Person a Party Defendant.*

[TITLE.]

On reading and filing the petition [*or* affidavit] of S. T., dated the day of, 18 . . , and proof of due service of notice of this motion, and on motion of E. F. for said S. T., and after hearing G. H. in opposition:

IT IS ORDERED, that S. T. be made a party defendant in said action, and that the summons and complaint be amended accordingly; and that said S. T. cause notice of appearance for himself herein to be given to plaintiff's attorney within days from the entry of this order, and a copy of the complaint as amended served upon his attorney, and that the cause thereupon proceed as if said S. T. had been originally a party defendant therein.

1. Assignees.—An assignee *pendente lite* of part of the subject matter of the controversy may be bought in. (*McGowan v. Levenworth*, 2 *E. D. Smith*, 24.) An assignee in bankruptcy or insolvency, but only on his own application. (*Cleaveland v. Boerum*, 3 *Abb. Pr.* 294.) If the owner of a claim assigns it absolutely, retaining, however, an interest in it, he may intervene to protect his interest in an action brought by the assignee to collect the same, and if he does not intervene, he is bound by the judgment. (*Gradwohl v. Harris*, 29 *Cal.* 150.) Where parties succeed to the interest of the defendant in the premises after the commencement of the action and before answer filed, they may be allowed to defend. *McFadden v. Wallace*, *Cal. Sup. Ct.*, *Jul. T.*, 1869.

2. Attachment Suits.—In an attachment suit, judgment-creditors of defendant may intervene to set aside the attachment because void as to them. (*Davis v. Eppinger*, 18 *Cal.* 378; *Fraser v. Green-*

hill, 3 *C. R.* 172; but see *Judd v. Young*, 7 *How. Pr.* 79; *Tallman v. Hollister*, 9 *How. Pr.* 508; *Sherman v. Partridge*, 4 *Duer*, 646.) A judgment-creditor, in a suit against a constable for levying on property of third person. (*Conklin v. Bishop*, 3 *Duer*, 646.) A judgment-creditor cannot seek to be brought in partition, but a party having an interest in the subject matter may be brought in. (*Waring v. Waring*, 3 *Abb. Pr.* 246.) In an action to recover money on which an attachment has been issued and levied upon property of the defendant, a subsequent attaching creditor may intervene at any time before the entry of judgment, for the purpose of contesting the validity of the first attachment. (*Speyer v. Ihmels*, 21 *Cal.* 280.) And the allegations in the pleading on the part of the intervenor traversing the complaint have the same effect as denials in the answer, and require affirmative proof by the plaintiff of his cause of action, in default of which the intervenor will have judgment in his favor. (*Id.*) Subsequent attaching creditors may intervene in a suit of the prior attaching creditor and the common debtor, when they allege that there is nothing due to said first creditor, and that his object is to hinder, delay and defraud his creditors. (*Speyer v. Ihmels*, 21 *Cal.* 280.) The intervenors become defendants, and as they allege that the plaintiff is not entitled to recover, it amounts to a denial of the facts set forth in the complaint, and consequently the *onus probandi* is on the plaintiff; and if he fails to prove his case, even though the real defendants have made default, judgment will be given in favor of the intervenors against him, and in his favor against the real defendants. (*Id.*) Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims. *Coghill v. Marks*, 29 *Cal.* 673.

3. Determination.—The Court shall determine upon the intervention at the same time that the action is decided; if the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention. *Cal. Pr. Act*, § 662.

4. Foreclosure.—A simple contract-creditor of a common debtor cannot intervene in a foreclosure suit. But judgment-creditors, being, as such, subsequent incumbrances, may intervene; and a court may order them to be made parties, probably by an amendment of the complaint as the better course, or on petition of intervention. (Horn

v. Volcano Wat. Co., 13 *Cal.* 62.) In a suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice. (*Id.*) In an action to foreclose a mortgage upon property claimed as a homestead, the wife should be allowed to intervene. *Sargent v. Wilson*, 5 *Cal.* 504; *Moses v. Warner*, 10 *Id.* 296; *Dillon v. Byrne*, 5 *Id.* 457.

5. Foreign Residence.—Where it was made apparent that the rights of the original parties could not be determined as between themselves, until the claim of a third person was liquidated, plaintiff was compelled to amend and bring such party in, though a resident of another State. (*Sturtevant v. Beaver*, 17 *How. Pr.* 571; 9 *Abb. Pr.* 414.) The fact that the persons who are necessary parties are not within the jurisdiction of the Court is not a reason for denying a motion to compel plaintiff to amend his complaint by joining them as parties. *Sturtevant v. Brewer*, 17 *How. Pr.* 571.

6. Husband and Wife.—In a suit for recovery of homestead, wife should be brought in. *Marks v. Marsh*, 9 *Cal.* 96.

7. Insolvent Corporation.—The receiver of an insolvent corporation was ordered to be substituted as defendant. *Fuller v. Webster Fire Ins. Co.*, 12 *How. Pr.* 293.

8. Interest of Parties.—Section 659 of the California Practice Act provides that any person shall be entitled to intervene who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both; and it permits the intervenor either to join the plaintiff in claiming what is demanded by the complaint, or to unite with the defendant in resisting the claim of the plaintiff, or to demand relief adversely to both the plaintiff and the defendant. (*Stich, plaintiff, Goldner, intervenor, v. Dickenson, Cal. Sup. Ct., Oct. T., 1869.*) The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation. (*Horn v. The Volcano Water Co.*, 13 *Cal.*

62.) To authorize an intervention therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation. *Horn v. Volcano Wat. Co.*, 13 *Cal.* 70; cited in *Stich*, plaintiff, *Goldner*, intervenor, *v. Dickenson*, *Cal. Sup. Ct., Oct. 7*, 1869.

9. Intervention Defined.—An intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant. *Cal. Pr. Act*, § 659.

10. Mechanic's Lien.—In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention. And, when the suit had been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused. (*Hocker v. Kelly*, 14 *Cal.* 164.) The filing of an intervention in an action to foreclose a mechanic's lien within the prescribed statutory time, and becoming parties to the suit during the existence of the lien, is the same as commencing an original action. *Mars v. McCay*, 14 *Cal.* 127.

11. Pleading upon Intervention.—The intervention shall be by petition or complaint, filed in the Court in which the action is pending, and it must set forth the grounds on which the intervention rests. A copy of the petition or complaint shall be served upon the party or parties to the action against whom anything is demanded, who shall answer it as if it were an original complaint in the action. (*Cal. Pr. Act*, § 661.) The petition of an intervenor must be treated as a declaration or complaint. *People v. Talmage*, 6 *Cal.* 256.

12. Party to Record.—This is an action in the nature of a bill in equity to set aside a judgment recovered by Pacheco against Hunsaker, who, as sheriff, seized and sold certain personal property of Pacheco, under an execution in favor of Dutil against Andeque. Dutil claims the right to maintain this action, on the ground that he indemnified the Sheriff against damages for taking said property. It appears by the pleadings, that when the action by Pacheco against Hunsaker was commenced, the latter gave Dutil notice of the action, and that Dutil took

charge of the defense, and by his own attorney defended the action from the commencement to the conclusion. Under such circumstances, the judgment against the Sheriff was conclusive evidence of his right to recover against Dutil on the bond of indemnity, by the provisions of Section six hundred and forty-five of the Civil Practice Act. By virtue of Section six hundred and fifty-nine, Dutil might have intervened and defended as a party to the record, as he did as a party in interest, in the name of the defendant on the record. *Dutil v. Pacheco*, 21 *Cal.* 441.

13. Proceedings in Intervention.—Where the merits of the case were not investigated in the lower courts, by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act relating to interventions, the Supreme Court awarded a new trial, although the decision of the court below upon the main question involved was approved, and the only error disclosed might have been cured by a direction to modify the judgment. (*Speyer v. Ihmels*, 21 *Cal.* 281.) It is too late on appeal to object that certain parties could not intervene in a suit pending in the inferior court. (*McKenty v. Gladwin*, 10 *Cal.* 227.) On intervention, if the proceedings between the debtor and a prior creditor are not void, but voidable, the defendant can alone object. *Dixey v. Pollock*, 8 *Cal.* 57.

14. Specific Performance.—In an action against several for a specific performance of their joint contract to purchase real estate of the plaintiff, and secure a part of the price by their bond and mortgage, the Court will not proceed unless all parties are in. *Powell v. Finch*, 5 *Duer*, 666.

15. Sureties.—*Sureties* may be let in to defend upon proper application, in the place of their principal. *Jewett v. Crane*, 13 *Abb. Pr.* 97; 35 *Barb.* 208.

16. Tax Suits.—A. & Co. having on general deposit with B. & Co. \$75,000, a tax for county purposes was levied thereon, and payment demanded of both A. & Co. and B. & Co.: *Held*, that the tax was legal, and that the County might intervene in an action concerning the money, to recover said tax. *Yuba Co. v. Adams*, 7 *Cal.* 37.

17. When Parties may Intervene.—A third person may intervene, either before or after issue has been joined in the cause.

(*Cal. Pr. Act*, § 660.) The sixteenth and seventeenth sections of the Practice Act, and the seventy-second, seventy-third and seventy-fourth sections of the amendments of 1854 to the Practice Act, give a party the right to intervene in an action in case of the transfer of any interest during the pendency thereof, or when he is directly interested in the subject matter in litigation, and this can be done either before or after issue has been joined in the case. *Brooks v. Hager*, 5 *Cal.* 281.

18. Who may Intervene.—Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. (*Cal. Pr. Act*, § 659.) Where one tenant in common sues to recover possession of the premises, and the damages sustained by the ouster, his co-tenants cannot intervene. (*Donner v. Palmer, Bradley Intervenor*, 23 *Cal.* 40.) The right to demur was given to enable the Court to carry out the provisions of this Section. (*Warner v. "Uncle Sam,"* 9 *Cal.* 697.) But, if after demurrer overruled, defendant pleads to the merits, he waives his rights to have other parties brought in. (*Freeman v. Newton*, 3 *E. D. Smith*, 246.) Or such right may be waived by undue delay. (*McMahon v. Harrison*, 12 *How. Pr.* 39.) Persons who ought to have been joined as parties, but who were not, may apply to come in, and if there are no laches on their part, may apply to come in at any time before final judgment. *Hubbard v. Eames*, 22 *Barb.* 597.

CHAPTER VII.

SUPPLEMENTAL PLEADINGS.

No. 1004.

Notice of Motion for Leave to File Supplemental Complaint.

[TITLE.]

[ADDRESS.]

Please take notice, that upon the affidavit and copy of supplemental complaints herewith served, and upon all the proceedings on file in this action, the undersigned will move the Court, at the court room thereof, at, on the day of, at the hour of o'clock in the noon, or as soon thereafter as counsel can be heard, for leave to file and serve such supplemental complaint in this action, or for such other relief as may be just.

[SIGNATURE.]

[DATE.]

1. Effect of Supplemental Pleading.—That the Legislature, in allowing supplemental complaints and answers, intended to follow the former chancery rule, and thus chose terms which import something additional or amendatory to what has gone before, see (12 *How. Pr.* 521; *Slawson v. Englehart*, 34 *Barb.* 198.) Leave to file supplemental complaint does not establish the plaintiff's right to sue for the original cause of action. (*Robbins v. Wells*, 1 *Rob.* 666.) And mere granting such leave decides nothing as to the plaintiff's rights. (26 *How. Pr.* 15; 18 *Abb. Pr.* 181.) A new cause of action cannot be set up by supplemental complaint. Matter must be consistent with and in

aid of original proceeding. (*Watson v. Thibou*, 17 *Abb. Pr.* 184; *Cordier v. Cordier*, 26 *How. Pr.* 187.) Nor can the nature of the plaintiff's claim be changed. (*Cheeseman v. Sturges*, 19 *Abb. Pr.* 293.) Or the rights of a substituted defendant enlarged, so as to enable him to traverse a fact submitted by his predecessor. *Forbes v. Waller*, 25 *N.Y.* 430; 25 *How. Pr.* 166.

2. Forms.—The rules as to forms and sufficiency of supplemental bills, see *Chauteau v. Rice*, 1 *Minn.* 106.

3. Fraud.—The discovery of fraud after filing the original bill against the assignee of a debtor may be added to the original bill by a supplemental complaint, without bringing in all the other creditors. (*Truebody v. Jacobson*, 2 *Cal.* 259; *Baker v. Bartol*, 6 *Cal.* 483; *Matoon v. Eder*, 6 *Id.* 61, *Davis v. Robinson*, 16 *Id.* 412.) Where a simple contract-creditor filed a bill against the assignee of his debtor, not attacking the assignment, and merely praying for a distribution; and the plaintiff subsequently filed a supplemental bill, setting forth that in the meantime he had become a judgment-creditor, and attacking the assignment for fraud, since discovered, and praying that it be set aside, and that the moneys in the hands of the assignee be appropriated to plaintiff's judgment: *Held*, That it is no objection to the supplemental bill, that it prays for a different relief, and fails to bring in all the other creditors who are alleged by the defense to be entitled to a ratable distribution. (*Baker v. Bartol*, 6 *Cal.* 473.) The gravamen of both bills is the indebtedness, and every supplemental bill is enlarged or altered by every additional and pertinent fact, and the plaintiff has the right to attack the assignment for fraud discovered since filing his original bill. *Id.*

4. Motion, when may be Made.—Where circumstances occurring subsequently to the commencement of the action render it proper, the same may be presented by supplemental pleadings, and issue taken thereon in the same manner as in the case of original pleadings. (*Cal. Pr. Act*, § 67; 1 *Van. Santv.* 378; 2 *Barb. Ch. Pr.* 635; *Van Maren v. Johnson*, 15 *Cal.* 311; *Stafford v. Howlet*, 1 *Paige*, 200; *Hornfager v. Hornfager*, 1 *Code R. (N.S.)* 180.) Such facts cannot be incorporated with the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. (*Van Maren v. Johnson*, 15 *Cal.* 308.) So, when a female subsequently marries, her husband must be joined with her, and this should be done, and an averment of the marriage be

made, by supplemental pleading, and not by amendment to the original. (*Van Maren v. Johnson*, 15 *Cal.* 311; *Kays v. Phelan*, 19 *Id.* 28.) In New York it was held that the filing of a supplemental complaint against the executor of a deceased defendant is a matter of right, and that leave of the Court need not and ought not to be obtained, though more than a year has elapsed. (*Re Bornsdorf v. Lord*, 41 *Barb.* 211; 17 *Abb. Pr.* 168; *Roach v. Le Farge*, 43 *Barb.* 616; 19 *Abb. Pr.* 167.) Leave, however, refused by general term of Superior Court, in case where original complaint was fatally defective. *Robbins v. Wells*, 26 *How. Pr.* 15; 18 *Abb. Pr.* 191.

5. Motion too Late.—Neither a purchaser at Sheriff's sale, as such, nor a redemptioner, either before or after redemption, nor an assignee of the Sheriff's certificate of sale, upon his own *ex parte* motion made in his own name, is entitled to have the judgment upon which the execution or order of sale issued, vacated, and himself substituted as plaintiff, in order that he may file a supplemental complaint to bring in other parties. *Abadie v. Lobero*, 36 *Cal.* 390.

6. Object of Motion.—The object of such motion is to bring before the Court facts of which the moving party was not able to avail himself at the time of the original pleading. Facts which did not occur subsequent to the original pleading, nor come to the knowledge of the mover thereafter, cannot be set up in a supplemental pleading. They must appear by amendment. (*McMahon v. Allen*, 3 *Abb. Pr.* 86; affirming S.C., 12 *How. Pr.* 39; *Houghton v. Skinner*, 5 *Id.* 420; *Dias v. Merle*, 4 *Paige*, 259.) And this, whether the application is made by the plaintiff, as in the former case, or by the defendant, in the latter. The converse is equally true in certain cases. *Hornfager v. Hornfager*, 1 *Code R. (N.S.)* 180.

*No. 1005.**Affidavit on Motion to File Supplemental Complaint.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. That he is the plaintiff in the above entitled action; that said action was commenced in this Court on the day of, 18.., by the filing of the complaint with the Clerk of this Court, and the issuing of a summons thereon; that, thereafter, on the day of, 18.., a copy of the summons, and certified copy of the complaint therein was served upon the defendant.

II. That the action is brought for the purpose of [*state the object of action*].

III. That issue has been joined therein, and the cause is now upon the calendar of this Court for trial.

IV. That he has read the annexed proposed supplemental complaint, and that the facts therein stated are true, of his own knowledge.

V. That said facts did not come to the knowledge of this deponent, nor had he any information thereof, until after the service of the original complaint herein.

[JURAT.]

[SIGNATURE.]

*No. 1006.**Order Granting Leave to File Supplemental Complaint.*

[TITLE.]

On reading and filing [*designate motion papers*], and on motion of E. F., attorney for the plaintiff, and after hearing G.H., attorney for the defendant:

IT IS ORDERED, that the plaintiff have leave to serve on defendant, within days after this date, a copy of the supplemental complaint filed upon this motion, on payment of dollars costs to the defendant.

[DATE.]

[SIGNATURE.]

*No. 1007.**Affidavit on Motion to File Supplemental Answer.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. That he is the defendant in the above entitled action.

II. That said action was commenced on the day of, 18..; that issue was joined therein by the serving and filing of this defendant's answer, on the day of, 18.., and this cause is now upon the trial calendar of this Court.

III. And this deponent further says, that this action is brought [*here state purpose of suit*]; that since the joining of the issue, to wit: on the day of 18.., this defendant paid to the plaintiff the sum of

..... dollars, in full payment of the note mentioned in the complaint, and of the costs, up to that day, accrued herein.

[SIGNATURE.]

[*Jurat.*]

No. 1008.

Order Granting Leave to File Supplemental Answer.

[TITLE.]

On reading and filing [*designate motion papers*], and on motion of G. H., attorney for defendant, and no one appearing in opposition:

IT IS ORDERED, that the defendant be allowed to file a supplemental answer herein, setting up [*state nature of defense*], such answer to be served upon the attorney for the plaintiff within days from the entry of this order.

[SIGNATURE.]

[DATE.]

7. After Reversal.—Where the Circuit Court, after a reversal of their decree, further proceedings being awarded, allowed a supplemental answer, to bring before the Court the facts which were proper to be known before instructions were given to master as to the mode of settling the accounts: *Held*, that under the circumstances this was proper, and no objection could be taken to it on a subsequent appeal. *Williams v. Gibbes*, 20 *How. U.S.* 535.

8. Discharge.—Evidence of the discharge of the debt sued on, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment *puis darrein continuance*. *Jessup v. King*, 4 *Cal.* 331.

9. Foreclosure.—A supplemental answer to a bill of foreclosure should embrace new matter discovered subsequent to the filing of the original answer. But this is a matter of discretion with the Court, who will not enforce the rule so as to work injustice. *Suydam v. Truesdale*, 6 *McLean*, 459.

10. Judgment.—Where, after answer has been served, setting up the pendency of another action, judgment has been rendered therein, the proper course to make evidence of such judgment admissible is to obtain leave to serve a supplemental answer alleging the fact. *N.P. Code*, § 177; 8 *How. Pr.* 56.

11. Parties.—New parties cannot be introduced into a cause by a cross bill. (*Shields v. Barrow*, 17 *How. Pr.* 130.) The objection, if it be one, that there is a misjoinder of parties plaintiff, owing to the matters which have occurred pending the action, must be taken by a supplemental answer, or it is waived. *Calderwood v. Pyser*, 31 *Cal.* 333.

12. Title Acquired.—If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, evidence of this fact cannot be introduced, unless it is pleaded as a defense in a supplemental answer. (*McMinn v. O'Connor*, 27 *Cal.* 246.) In actions to recover lands, title acquired by defendants *pendente lite*, and other matters of defense arising subsequent to the commencement of the suit, must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*. *Moss v. Shear*, 30 *Cal.* 468.

13. Title of Plaintiff Terminated.—The defendant cannot prove, on the trial of an action of ejectment, for the purpose of showing that plaintiff's right of possession has terminated, that since the action was commenced plaintiff has conveyed the land to another person, unless the fact of such conveyance has been set up in the original or a supplemental answer. (*Id.*) New matter must be specially pleaded; and, in ejectment, a transfer of title by the plaintiff, or a title acquired by defendant, pending the action, must be pleaded by supplemental answer, or it cannot be given in evidence. *Id.*; *McMinn v. O'Connor*, 27 *Cal.* 246.

14. When Allowed.—Where a defendant has answered generally to a matter of which he has no particular knowledge, he may be allowed to file a supplemental answer on the same subject after he has acquired particular information concerning it, and to introduce into such answer new matter which has come to his knowledge since filing the original answer, on furnishing the opposite party with the names of the witnesses by whom he expects to prove it. *Caster v. Wood*, 1 *Baldw.* 289.

15. When to be Filed.—A defendant cannot file a cross bill until the original bill is answered. (*Allen v. Allen*, *Hempst.* 58.) Leave will not be given to set up by supplemental answer matter not constituting a defense. (*Betz v. Betz*, 19 *Abb. Pr.* 90.) And the answer proposed must be true, and must contain a good defense, or leave will be refused; and its truth may be inquired into on motion. (*Morel v. Garely*, 16 *Abb. Pr.* 269.) But the objection that inconsistent causes of action are united in a cross complaint is waived unless demurred to by the plaintiff. (*McClory v. McClory*, *Cal. Sup. Ct., Jul. T.*, 1869.) A cross bill is brought by a defendant in a suit against plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. If it is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill, it should not introduce new and distinct matters not embraced in the original bill. The cross bill is auxiliary to the proceeding in the original suit, and a dependency upon it. *Ayres v. Carver*, 17 *How. Pr.* 591; *Cross v. De Valle*, 1 *Wall. U.S.* 5; *Hubbard v. Turner*, 2 *McLean*, 519; *Morgan v. Tipton*, 3 *Id.* 339.

CHAPTER VIII.

SUBSEQUENT PLEADINGS.

No. 1009.

Demurrer to Answer.

[TITLE.]

The plaintiff demurs to the answer of the defendant [*or* the first *or* other defense *or* counter claim contained in the answer of the defendant], for insufficiency in not stating facts sufficient to constitute a defense [*or* counter claim, *or* that the Court has no jurisdiction of the subject of said counter claim].

1. Demurrer Lies.—The defendant having answered, if the answer contain matters of avoidance or a counter claim, the plaintiff may, in the time within which the defendant was required to answer, demur to the defendant's answer. (*Cal. Pr. Act*, § 50; *N.Y. Code*, § 153; *Laws of Oregon*, p. 158, § 76; *Laws of Idaho*, p. 87, § 50; *Laws of Wash. T.* p. 95, § 62; 2 *Whitt. Pr.* 192; see "*Demurrer*," Vol. ii., p. 594.) Demurrer will lie to a bill called a "cross bill," if it is not really so. (*Moss v. Anglo-Egyptian Navigation Co.*, *Law Rep.* 1 *Ch.* 108.) Or to a supplemental pleading. (*Goddard v. Benson*, 15 *Abb. Pr.* 191.) Or to amended answer, just as if it were an original one. The rule is well settled that the amended pleading takes the place of and supersedes the original one. (4 *How. Pr.* 174; 13 *Abb. Pr.* 92; *Van Santv. Pl.* 795; *Sands v. Calkins*, 30 *How. Pr.* 1.) That a demurrer will not lie to an amended answer, but that objection should have been raised at the time of application for the amendment, was held in (*Therasson v. Peterson* 22 *How. Pr.* 98.) A demurrer to the whole of an amended declaration will lie, although issue had been joined on

some of the counts in the original. (*McIntyre v. Griswold*, 2 *How. Pr.* 113.) A brief statement *appended* to the general issue is but a notice, requiring no answer, and is not, therefore, the subject of a demurrer. (*Leslie v. Harlon*, 18 *N. H.* 518.) Where amendments are made to a plea, and it is still insufficient, the plaintiff should demur. (*Cox v. Capron*, 10 *Mo.* 691.) Where a plea in its commencement professes to answer the whole action, but answers only a part, it is bad on general demurrer. 7 *Mo.* 237.

2. Demurrer will not Lie.—A demurrer does not lie to an answer which sets up no new matter. (*Smith v. Greening*, 2 *Sandf.* 702; *Ketcham v. Zerega*, 1 *E. D. Smith*, 557; *Thomas v. Harrop*, 7 *How. Pr.* 57; *People v. Barker*, 8 *Id.* 261; *Reilay v. Thomas*, 11 *Id.* 266; *Lund v. Seaman's Sav. Bk.*, 37 *Barb.* 129; 23 *How. Pr.* 258; *Mavetzek v. Cauldwell*, 19 *Abb. Pr.* 35; *Rice v. O'Connor*, 10 *Abb. Pr.* 362; overruling *Hopkins v. Everett*, 6 *How. Pr.* 159.) Averments of truth, or matter in mitigation, in answer in libel, do not constitute demurrable new matter. (*Mavetzek v. Cauldwell*, 19 *Abb. Pr.* 35.) Nor are hypothetical averments demurrable on that ground. (*Taylor v. Richards*, 9 *Bosw.* 679.) Demurrer will not lie to an answer consisting of denials only. (*Loomis v. Dorsheimer*, 8 *How. Pr.* 9; *Simpson v. Loft*, 8 *How. Pr.* 234; *Roosa v. Saugerties and Woodstock Turnpike Co.*, 8 *How. Pr.* 237; *Mead v. Florence*, 9 *How. Pr.* 396; *Richtmeyer v. Haskins*, *Id.* 481; *Myatt v. Saratoga Co. Mut. Ins. Co.*, *Id.* 488; *Perkins v. Farnham*, 10 *Id.* 120; *Ketcham v. Zerega*, 1 *E. D. Smith*, 553; *Kneedler v. Sternbergh*, 10 *How. Pr.* 67; *Rice v. O'Connor*, 10 *Abb. Pr.* 362; *Lund v. Seaman's Sav. Bk.*, 23 *How. Pr.* 258.) For objections which require consideration of the Court, and to be substantiated by argument, (*Littlejohn v. Greeley*, 22 *How. Pr.* 345; 13 *Abb. Pr.* 311.) Demurrer will not lie to part of an entire defense; (*Cobb v. Frazee*, 3 *Code Rep.* 43; 4 *How. Pr.* 413; *Welch v. Hazleton*, 14 *How. Pr.* 97; *Dimon v. Bridge*, 8 *How. Pr.* 16; *Watson v. Husson*, 1 *Duer*, 242; *Smith v. Greenin*, 2 *Sandf.* 702;) or in respect of wholly immaterial matter; (*Graham v. Stone*, 6 *How. Pr.* 15; 1 *Code R. (N.S.)* 181; *Newnan v. Otto*, 4 *Sandf.* 668; 10 *L. O.* 14; *Matthews v. Beach*, 5 *Sandf.* 256;) unless immaterial matter forms part of a defense otherwise insufficient, and is relied on as a bar. (*Foy v. Bennett*, 5 *Sandf.* 54; 9 *L. O.* 330; *Ayres v. Covell*, 18 *Barb.* 260.) Demurrer must be to the whole ground of defense. (*Fabricotti v. Launitz*, 1 *Code Rep.* 122; *Rice v. O'Connor*, 10 *Abb. Pr.* 362.) The want of affidavit to a plea of *non est factum* is not ground of demurrer.

(*Parker v. Simpson*, 1 *Mo.* 539.) A bond signed by two, having but one seal, if either party has not signed or sealed the instrument he should plead *non est factum* under oath. *Smith v. Hart*, 1 *Mo.* 273.

3. Effect of Demurrer.—A general demurrer to a plea confesses all the facts in the plea if they are well pleaded. (*Washington Road v. State*, 19 *Md.* 239; *Lyon v. O'Kee*, 14 *Iowa*, 233; *Smith v. Henry*, 15 *Id.* 385.) But not the soundness of the conclusions of law. (*Smith v. Henry*, *Id.*; *Branham v. San Jose*, 24 *Cal.* 585; *Griggs v. St. Paul*, 9 *Min.* 246.) Where the allegations of an answer are contradictory, a demurrer only admits those allegations which the law adjudges to be true. (*Freeman v. Frank*, 10 *Abb. Pr.* 370.) A demurrer to an answer to a petition for a writ of mandate is an admission of the truth of the matters averred in the answer. *Middleton v. Law*, 30 *Cal.* 596.

4. Grounds for Demurrer.—A demurrer to an answer must state the grounds. (*Ketchum v. Zerega*, 1 *E.D. Smith*, 554.) Objections to an inadmissible counter claim or set off may be taken by demurrer. (*Van Valen v. Lapham*, 13 *How. Pr.* 240; *Merritt v. Millard*, 5 *Bosw.* 645; *Welch v. Hazelton*, 14 *How. Pr.* 97.) A demurrer lies in all cases to an answer containing new matter. (*Sands v. Calkins*, 30 *How. Pr.* 1.) Demurrer lies to an insufficient defense. (*Russell v. Harding*, 12 *L. O.* 216; *Hyde v. Conrad*, 5 *How. Pr.* 112; *Thumb v. Walrath*, 6 *How. Pr.* 196; 1 *C. R. (N.S.)* 316; *Gregory v. Levy*, 12 *Barb.* 610; 7 *How. Pr.* 37; *Merchants' Bk. of New Haven v. Bliss*, 21 *How. Pr.* 365; 13 *Abb. Pr.* 225; *Schermerhorn v. Gogue*, 13 *Abb. Pr.* 315.) Or insufficiently pleaded. (*Bridge v. Payson*, 1 *Duer*, 614; *Arthur v. Brooks*, 14 *Barb.* 533; *Anibal v. Hunter*, 6 *How. Pr.* 255; 1 *Code R. (N.S.)* 403; *Blake v. Eldred*, 18 *How. Pr.* 240; *Lewis v. Kendall*, 6 *How. Pr.* 59; 1 *Code R. (N.S.)* 402; *Buddington v. Davis*, 6 *How. Pr.* 401; *Bush v. Prosser*; 1 *Kern.* 347; *Houghton v. Townsend*, 8 *How. Pr.* 444; *Wilson v. Robinson*, 6 *How. Pr.* 110; *People v. Banker*, 8 *How. Pr.* 258; *Freeman v. Frank*, 10 *Abb. Pr.* 370; *Smith v. Countryman*, 30 *N.Y.* 655; *Ketchum v. Zerega*, 1 *E.D. Smith*, 553.) That a demurrer to the answer is confined to the single ground of insufficiency, (*Gilbert v. Covell*, 16 *How. Pr.* 34.) So, mere irrelevancy is no ground for demurrer. (*Watson v. Husson*, 1 *Duer*, 242.) That defendant is civilly dead is cause for demurrer. (*Freeman v. Frank*, 10 *Abb. Pr.* 370.) An objection that the plea amounts to the general issue can only be taken advantage of by a

special demurrer. *Swearinger v. Knox*, 10 *Mo.* 31; *Hotchkiss v. Ladd*, 36 *W.* 593.

5. Sufficient Statement.—Where an answer professes to set up new matter for a defense, and does not state facts which constitute a defense, it may be demurred to for insufficiency. (*Merritt v. Millard*, 5 *Bosw.* 645.) In such case it is sufficient to allege that the facts stated therein do not constitute any defense. (*Anibal v. Hunter*, 6 *How. Pr.* 255; *Arthur v. Brooks*, 14 *Barb.* 533; *Hyde v. Conrad*, 5 *How. Pr.* 112; *Xenia Branch of St. Bk. of O. v. Lee*, 2 *Bosw.* 694.) Or where a plea in its commencement professes to answer the whole action, but answers only a part. (*Weimer v. Shelton*, 7 *Mo.* 237.) In Iowa, a demurrer to a plea, on the ground that it consists of matter of evidence or argument, without stating the reasons sustaining the conclusion, is sufficiently specific. *Davenport v. Davenport*, 15 *Iowa*, 6; *Davis v. Bowan*, 15 *Id.* 171.

6. Waiver by Failure to Demur.—Failure of plaintiff to demur waives the objection. (*Ritchie v. Davis*, 5 *Cal.* 453; *Livingston v. Miller*, 4 *Seld.* 289; *White v. Spencer*, 4 *Kern.* 248; *N.Y. Cent. Ins. Co. v. Nat. Pro. Ins. Co.*, 4 *Kern.* 85; *St. John v. Northrup*, 23 *Barb.* 26; *Cady v. Allen*, 22 *Id.* 394.) Omission to demur to counter claims has the same effect as omission to demur to complaint. (*Ayres v. O'Farrell*, 10 *Bosw.* 143.) Where a party sets up matter in his answer not recognized by law as a defense to the action, the objection is not waived by failure of plaintiff to demur, but may be taken advantage of at any time. (*McDougall v. Maguire*, 35 *Cal.* 274; *Case v. Maxey*, 6 *Cal.* 276.) Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder: *Held*, that the appellate court would not decide upon the demurrer. The point was waived by filing the amended rejoinder. *United States v. Boyd*, 5 *How. Pr.* 29.

7. What Demurrer Admits.—As to facts admitted on demurrer, see (*Graham v. Dunnigan*, 6 *Duer*, 629; 4 *Abb. Pr.* 426; *Burr v. Wright*, 9 *How. Pr.* 542; *Clark v. Van Deuson*, 3 *Code R.* 219.) An answer which contains a cross complaint may likewise be demurred to, and so much of any pleading as is irrelevant, redundant, or immaterial, may be stricken out on motion. (See Sec. 50, *Cal. Pr. Act*; *N.Y. Code*, § 152; *Laws of Oregon*, p. 158, § 78; *Laws of Idaho*, p. 87, § 50; *Laws of Wash. T.*, p. 95, § 61; 2 *Whitt. Pr.* § 172.

8. What Demurrer Should Show.—The demurrer should show to which of several defenses it is interposed. Where, however, a demurrer to an answer containing two defenses, one of which was good and the other bad, purported to be to the whole answer, but it was evident from the assignment of grounds of the demurrer that it had reference to the second defense only: *Held*, that it was not error, under the liberal mode of construing pleadings enjoined by the Code, to construe it as being substantially limited to the badly pleaded defense, and to render judgment allowing it accordingly. *Matthews v. Beach*, 8 *N.F.* 173.

REPLICATION.

No. 1010.

Reply to Counter Claim.

[TITLE.]

The plaintiff replies to the counter claim contained in the answer of the defendant [*or the first or other counter claim contained in the answer of the defendant*].

I. That, etc. [*denying as in an answer.*]

1. Chancery Practice.—In general, if the complainant in a bill in chancery does not file a general replication to the answer of the defendants, the answer is to be taken as true, and no evidence can be given by the complainant to contradict it. (*Gallagher v. Roberts*, 1 *Wash. C. Ct.* 320; *Pierce v. West*, *Pet. C. Ct.* 351.) After a cause was set for hearing, on bill and answer, and reference to the auditor directed, the plaintiff was allowed to file a general replication. (*Pierce v. West*, *Pet. C. Ct.* 351.) A replication to a plea in chancery is an admission of its sufficiency as a defense. *Hughes v. Blake*, 7 *Wheat.* 453; affirming *S.C.*, 1 *Mas.* 515.

2. Conclusion.—A replication containing new matter should conclude with a verification, and not to the country. (*Hallett v. Slidell*, 11 *Johns.* 56; *Hanna v. Rust*, 21 *Wend.* 149.) But if it states no new matter, it may conclude to the country. (*Blindon v. Robinson*, 1 *Johns.* 516; *Patcher v. Sprague*, 2 *Johns.* 462.) A replication

at once denying the particular fact intended to be put in issue, and concluding to the country, without any preamble, and without a formal traverse, frequently occurs in practice; and on account of conciseness should when practicable be adopted. (1 *Chitt. Pl.* 592; 2 *T. R.* 442.) If a plea answers the matter which is the gist of the action, it is sufficient. (1 *Sand.* 28; 2 *T. R.* 297; 3 *Wils.* 20; *Andrus v. Warning*, 20 *Johns.* 153; see, also, *Swider v. Croy*, 2 *Id.* 428.) In an action of debt against devisees, a replication of assets by descent may conclude with a verification. *Labagh v. Cantine*, 13 *Johns.* 272.

3. Counter Claim of Defendant.—A counter claim is in the nature of a complaint in a cross action. If it is a demand for damages for converting property, it is not necessary for the plaintiff to put in a reply denying the amount of value or the allegation of damage. These must be proved on an assessment, although the plaintiff puts in no reply. (2 *E. D. Smith*, 314.) And defendant is entitled to only nominal damages, unless he prove substantial damage. (*McKenzie v. Farrell*, 4 *Bosw.* 192; *Merritt v. Millard*, 5 *Id.* 645.) A reply merely denying that the defendant is entitled to any sum admits the facts set up as in counter claim. (*McKenzie v. Farrell*, 4 *Bosw.* 192.) The plaintiff's complaint contained eight counts in the common form; the defendant's answer denied generally all the allegations of the complaint, and set up a counter claim; the plaintiff's reply contained, among other things, a counter claim to the defendant's counter claim, and the defendants moved to strike out this portion of the reply. *Held*, that defendants had mistaken their remedy; they should have demurred. Whether such reply is good, *query*, *Stewart v. Travis*, 10 *How. Pr. R.* 148.

4. Demurrer or Answer.—When the answer contains a cross complaint, the parties against whom relief is therein demanded may demur or answer thereto within the like period. (*Cal. Pr. Act*, § 50.) In respect to matter in evidence, and to the counter-claims, the rule is the same as before the amendments of 1866. Those amendments introduced a new pleading called a cross complaint. When the answer contains a cross complaint, it must be replied to, so far as the cross complaint is concerned, or the matters therein alleged will be taken as confessed; but in no other respect is the plaintiff required to reply to the answer. *Herold v. Smith*, 34 *Cal.* 120.

5. Form.—A replication which is merely a denial is not special. (*Manhattan Co. v. Miller*, 2 *Cai.* 60; *S.C., Col. & C. Cas.* 345.)

Where the defendant pleads a record of the same court, the replication of *nul tiel record* concludes with a verification, and a day is given to the parties to have judgment; if the plea be of a record of another court, the replication may either conclude by giving the defendant a day to bring in the record, or with an averment and prayer of debt and damages; in which latter case there must be a rejoinder reasserting the existence of the record. *Bobyshall v. Oppenheimer*, 4 *Wash. C. Ct.* 388.

6. When not Permitted.—A reply cannot be permitted where no counter claim is interposed by the answer. New matter, which does not constitute a counter claim, is to be deemed controverted. 8 *How. Pr.* 205; 9 *Id.* 481, 488; 1 *Duer*, 683; *Devlin v. Bevins*, 22 *How. Pr.* 290; see *Bissell v. Pearse*, 21 *How. Pr.* 130.) In New York, however, by the amendment of 1860, the Court may, in its discretion, on defendant's motion, require a reply to new matter, constituting a defense by way of avoidance, to be subject to the same rules as a reply to a counter claim. (*Laws of N.Y.*, 1860, p. 785; *N.Y. Code*, § 153; *Garner v. Manhattan Building Association*, 6 *Duer*, 539.) The practice in California requires a demurrer to be interposed in such a case. Under the Statute of California, the affirmative allegations of the answer stand controverted by the plaintiff, the burden being on the defendant to prove their truth, rendering a reply unnecessary. (*Bryan v. Maume*, 28 *Cal.* 238.) And a counter claim or matter in avoidance set up in an answer need not be denied by plaintiff to put defendant upon his proof. (*Herold v. Smith*, 34 *Cal.* 120.) In Pennsylvania, where the replication puts in issue the averments of the answer, it throws upon the defendants the burden of sustaining them. *Naglee's Estate*, 52 *Penn.* 154.

No. 1011.

General Denial of New Matter.

[TITLE.]

The plaintiff replies to the answer of the defendant:

I. That he denies each and every allegation contained in the [second] defense.

II. [*Or*, As to the [second] defense, by way of counter claim set forth in the answer, he denies each and every allegation therein.]

No. 1012.

Special Denial.

[TITLE.]

The plaintiff replies to the answer of the defendant:

That he denies [*here insert the particular allegation denied*].

7. Sufficient Reply.—If an answer alleges mere matters of evidence, a replication traversing the ultimate and issuable fact which the answer was intended to aver, is sufficient. *Moore v. Murdock*, 26 Cal. 514.

No. 1013.

Reply Interposing both Denial and New Matter.

[TITLE.]

The plaintiff replies to the answer of the defendant herein:

First—For a first reply to the [first] counter claim:

He denies each and every allegation of the answer respecting the same.

Second—For a second reply to said counter claim he alleges:

That at the time alleged in the complaint as the time of making the supposed note therein mentioned, this plaintiff was under the age of twenty-one years, to wit, of the age of years.

NOTE.—In California, there is no such practice as a counter claim to a counter claim. The following notes and authorities are inserted, though some of them are not law under our Code. Whether a plaintiff may interpose in his reply a counter claim to the counter claim of the defendant, compare (*Miller v. Losee*, 9 *How. Pr.* 356; *Stewart v. Travis*, 10 *Id.* 148.) The replication may introduce new matter to explain and fortify the complaint without a departure. (*Hallett v. Slidell*, 11 *Johns.* 56.) It has been held, in the United States Circuit Court, that the practice now is, where the plaintiff finds it necessary from the answer to prove new matter, to amend the bill. Nevertheless, if a special replication containing the essential qualities of a general replication is filed, denying all the material parts of the answer, and also charging new matter, it will be considered as surplusage at the hearing. (*Duponti v. Mussy*, 4 *Wash. C. Ct.* 128.) A departure in pleading is not allowed in equity. If the answer requires a new case to be made, it cannot be done in the replication, but must be by an amendment to the bill. *Vattier v. Hinde*, 7 *Pet.* 252.

9. To Plea of Bankruptcy.—A replication setting forth in the words of the Act all the grounds on which a discharge would be void by the Act is bad; it must specify the particular fraud relied on. *Service v. Heermance*, 2 *Johns.* 96.

10. To Plea in Bar.—Though in England a court of law protects the title of an equitable owner of a chose in action sued on in the name of the legal owner, by refusing to receive a plea which is in fraud of his rights, yet they will not allow these rights to be shown by way of replication to what is a good plea in bar of the action of the plaintiff, nor admit them to be relied on at the trial. The law of the United States courts is otherwise; and the proper practice is to reply the equitable title and notice thereof to the defendant, and thus show the asserted bar to be in fraud of his rights; and when thus shown the bar is adjudged insufficient. 1 *Wheat.* 232; 1 *Wash. C. Ct.* 424; 19 *John.* 95; 13 *Mass.* 304; 1 *Curt. C. Ct.* 239; *Brown v. Hartford Ins. Co.*, 11 *Law. Rep. (N.S.)* 726.

12. To Plea of Former Recovery.—Plaintiff replied *protestando* that in a former action two trespasses had been joined in the same count, and that the Court on notice compelled him to elect for which he would proceed, and that he should not go for both; and that the jury found damages accordingly. *Held*, that the former recovery

was no bar, but the replication was bad, as being argumentative, instead of traversing, and denying the former recovery. (*Snider v. Croy*, 2 *Johns.* 227.) A replication to a plea of a former recovery, that the evidence was wholly insufficient to establish the claim, or that no evidence was offered or received by the Court, will not avoid the bar. *Ramsey v. Herndon*, 1 *McLean*, 450.

13. To Plea of Fraud.—In an action on a note, the plea was that the note was given by the defendant to the plaintiff in payment for land, which the defendant had been induced to buy of him by his false and fraudulent representation, that he was the owner of it. *Held*, that fraud was the material allegation, and a replication denying the fraudulent representation was a perfect answer. (*Bradner v. Demick*, 20 *Johns.* 404.) If the maker of a note pleads a set-off, and that the paper was fraudulently transferred to the plaintiff to prevent the set-off, a replication merely alleging legal title admits the fraudulent transfer and the set-off. *Savage v. Davis*, 7 *Wend.* 223.

14. To Plea of Judgment.—If a defendant pleads judgment, and no assets *ultra*, replication thereto may either be *nul tiel record* or assets *ultra*, or *per fraudem*, or other matter of facts; and such replications are probably triable by jury. (*Teasdale v. Brantons*, 2 *Hayw.* 377.) If the plea avers that the promise sued on was a promise to pay the debt of another, to wit, B., a replication that the promise was not a promise to pay the debt of said B. is good. *Hotchkiss v. Ladd*, 36 *Vt.* 593.

15. To Plea of Justification.—A replication neither answering nor aiding the matter of a special plea of justification is bad. (*Foshay v. Riche*, 2 *Hill*, 247.) In trespass, where the defendant pleads in justification a simple reference to a statute, the plaintiff must reply *de injuria propria*. (*Conally v. Sackwood*, 15 *Johns.* 188.) The general replication *de injuria sua propria absque tali causa* is bad when the defendant insists on a right, and is good only when he insists on matter of excuse. (8 *Co.* 66; *Will.* 54; 1 *Bos. & P.* 76; *Lytte v. Lee*, 5 *Johns.* 112; *Plumb v. McCrea*, 12 *Id.* 491; *Allen v. Crofoot*, 7 *Cow.* 46; *Griswold v. Sedgwick*, 1 *Wend.* 126; *Coburn v. Hopkins*, 4 *Id.* 577; *Tubbs v. Caswell*, 8 *Id.* 129.) In a plea justifying an arrest under process, an allegation of its loss, by way of an excuse for not producing it, does not turn the justification into matter of excuse; (*Coburn v. Hopkins*, 4 *Wend.* 577;) and a replication may contest the

warrant and conclude *de injuria, etc.* (*Stickle v. Richmand*, 1 *Hill*, 77.) The general replication *de injuria* to a plea of *molliter manus imposuit* puts in issue every material allegation, including the reasonableness of the force, and the plaintiff may recover, if an excess of force is shown. *Bennett v. Appleton*, 25 *Wend.* 371.

16. To Plea of Misnomer.—To a plea of misnomer, a replication that the defendant is known as well by one name as the other is good. *Petrie v. Woodworth*, 3 *Cai.* 219.

17. To Plea of Payment.—When the answer in a suit on a bill of exchange sets up payment, part in money and the residue in bills of exchange, which, it is averred, were received by the plaintiff in payment, a replication which simply avers the non-payment of the bills, and the insolvency of the drawers and drawees at their maturity, tenders an immaterial issue, and the finding should be for the defendant upon the pleading. (*Frisbie v. Lindley*, 23 *Ind.* 511.) Reply unnecessary to an answer pleading merely payment. (*Brackett v. Wilkinson*, 13 *How. Pr.* 102.) An answer for a defense to the demand sued for averred that the defendant had paid certain sums to plaintiff, and concluded with a notice that defendant would insist on the sums so paid as a counter claim, and a demand for judgment. *Held*, that this did not set up a counter claim, but the facts pleaded amounted to the defense of payment only, and therefore no reply was necessary. *Burke v. Thorn*, 44 *Barb.* 363.

18. To Plea of Performance.—A replication to a plea of general performance, in an action on a bond, should assign a special breach. An omission to do so must be taken advantage of by demurrer, and is cured by verdict. *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46-70.

19. To a Plea of Privilege by an Attorney, it is a good replication that for a year he had ceased to practice. *Brooks v. Patterson*, *Col. & C. Cas.* 133.

20. To a Plea of Usury.—The plaintiff may reply that it was not corruptly agreed, in manner and form, etc., without a traverse, and with a conclusion to the contrary. 2 *Str.* 871; *Waterman v. Haskin*, 7 *Johns.* 283.

*No. 1014.**Reply of Statute of Limitations.*

[TITLE.]

The plaintiff replies to the answer herein:

That the said cause of action alleged for a counter claim [*or* demand alleged as a set-off] in said answer did not accrue at any time within years next before the commencement of this action.

21. Facts must be Alleged.—Where the Statute of Limitations is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, he must, in his replication, or by an amendment to his bill, set forth the facts specially. (*Miller v. McIntyre*, 6 *Pet.* 61; affirming *S.C.*, 1 *McLean*, 85; *Piatt v. Vattier*, 9 *Pet.* 405; *Taylor v. Benham*, 5 *How. Pr.* 233; *Marsteller v. McClean*, 7 *Cranch*, 156.

22. Facts must be Traversed.—In the correct order of pleading it is necessary that the facts of the plea should be traversed by the replication, unless matters in avoidance be set up. It is not sufficient that the facts alleged in the replication are inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea. *United States v. Buford*, 3 *Pet.* 12; *Jones v. Hays*, 4 *McLean*, 512.

23. Fraud as a Reply.—Fraud is a sufficient answer to the plea of the Statute of Limitations, and if the defendant fraudulently seized the notes, he is not only estopped from setting up the Statute, but it would begin to run only from the discovery of the fraud. *Bricker v. Lightner's Executor*, 40 *Penn.* 199.

24. Insufficient Reply.—A replication to a plea of the Statute of Limitations that the plaintiff lives in another State, there being no such exception in the Statute, is bad. (*Jones v. Hays*, 4 *McLean*, 521.) To a plea of the Statute of Limitations, it is not a good replication that a suit for the same demand was commenced in a court in another State, and discontinued within six years. (*Delaplaine v. Crowninshields*, 3

Mas. 329.) When the plea avers that the cause of action mentioned in the declaration did not, nor did either of them, accrue within six years, a replication which alleges that said causes of action, or some of them, did accrue within six years, is bad for uncertainty. (*Hotchkiss v. Ladd*, 36 *W.* 593.) A replication of a new promise by the executor, to his plea of limitations to a count on the promise of the testator, is bad for departure. (*Benjamin v. De Groot*, 1 *Den.* 151.) In general, a replication must not depart from any material allegation in the complaint; yet, where there is an evasive plea, the plaintiff may avoid the effect of it, by resisting his cause of action with more particularity and certainty, so as to meet and thwart the particular defense set up. 1 *Chitt. Pl.* 603; *Troup v. Smith*, 20 *Johns.* 33.

25. Promissory Note.—Where, in an action on a promissory note, brought under the Code of 1848, the defendant pleaded the Statute of Limitations, and the plaintiff replied, merely denying the plea: *Held*, that evidence of a new promise was admissible under the reply. (*Esseltyn v. Weeks*, 2 *Abb. Pr.* 272.) Where, in an action by an executor upon notes due to his testator by the defendant, who it was alleged had fraudulently seized them after the death of the testator, the defendant pleaded the Statute of Limitations, after the commencement of the trial, and it was evident that the fraudulent seizure was the plaintiff's answer to the plea: it was *held*, that the want of a formal replication was not cause for reversing the judgment. *Bricker v. Lightner's Executor*, 40 *Penn.* 199.

No. 1015.

Demurrer to Reply.

[TITLE.]

The defendant demurs to the plaintiff's reply [*or first or other reply*], for insufficiency, in not stating facts sufficient to constitute a reply.

26. Rejoinder, its Office.—A rejoinder must answer the replication, and tender an issue on a single point. If it is double, it is demurrable. (*United States v. Cumpton*, 3 *McLean*, 163; and see *McGowan v. Calderwell*, 1 *Cranch C. Ct.* 481.) A rejoinder is bad which avers several distinct answers to the replication, or puts matter of law in issue

to the jury. (*McCue v. Corporation of Washington*, 3 *Cranch C. Ct.* 639.) A rejoinder must maintain the plea, and cannot set forth matter at variance with it. (*Barlow v. Todd*, 3 *Johns.* 367; *Allen v. Watson*, 16 *Id.* 205.) After pleading that the plaintiff was not damnified, the defendant cannot rejoin confessing and avowing the action; (*Co. Litt.* 304; 2 *Wils.* 96; 4 *T.R.* 504; 2 *Cai.* 320; 3 *Johns.* 367; 16 *Id.* 205;) by setting up a personal discharge. (*Andrus v. Waring*, 20 *Johns.* 153.) So, one defendant, having joined with the others in a plea in bar, cannot afterwards interpose a rejoinder going to his personal discharge. 2 *Str.* 995; 2 *Cai.* 108; *Andrus v. Waring*, 20 *Johns.* 153.

26. Breach of Agreement.—A replication, in an action of covenant on an agreement to build, *held*, bad for traversing immaterial time and place, and introducing averments of performance before made in the declaration. (*Rogers v. Burk*, 10 *Johns.* 400.) To a declaration for a breach of an agreement to bid at auction up to a certain limit, the defendant pleaded that the property was sold for more. *Held*, that a reply of fraud in the defendant in procuring the bids for the greater amount was no departure. *Barne v. Drew*, 4 *Den.* 287.

27. Conversion.—A declaration alleged that the defendants wrongfully took certain goods. The replication averred that the taking was by a sheriff, at the instance and by the direction of the defendants. *Held*, that there was no departure. *Richardson v. Hall*, 21 *Md.* 399.

28. Demurrer to Reply.—The reply of the plaintiff stated that he was himself the receiver mentioned in the answer, and that he was the holder and owner of the note as such receiver, and that he sought to recover upon it in that capacity, and not individually. The defendant demurred to the reply, assigning several grounds, the substance of which was that the reply was a departure from the complaint. *Held*, that the demurrer was well taken. The reply was a total departure from the complaint. The right to recover individually and the right to recover as receiver are entirely distinct rights, and depend upon entirely different facts. The plaintiff, on receiving the answer, should have amended his complaint, or, if it was not amendable, he should have discontinued. *White v. Miles*, 11 *How. Pr. R.* 36.

29. Departure.—A departure is matter of substance, and bad on general demurrer. (2 *Wils.* 96; 1 *Id.* 122; 4 *T. R.* 504; *Wille.* 638, 25, 27; 2 *Saund.* 84; *Sterns v. Patterson*, 14 *Johns.* 132.) Where, to a plea of title, the replication sets up a release from the plaintiff, a re-

joinder that the lease reserved the right to enter is departure. (11 *East*, 188; *Dutton v. Holden*, 4 *Wend.* 643.) A rejoinder of infancy, *held*, a departure from a plea of an insolvent discharge. (*Roberts v. Kelly*, 2 *Hall.* 307.) After a plea of no award, a rejoinder confessing and avoiding the award, is a departure. (*Munro v. Alaire*, 2 *Cai.* 320.) A rejoinder impeaching the award as incomplete is a departure. (*Barlow v. Todd*, 3 *Johns.* 367.) But a rejoinder that the defendant prior to the making of the award, had, by writing under his hand and seal, revoked the submission, is good. A void award is no award. (11 *East*, 187; *Allen v. Watson*, 16 *Johns.* 205.) A rejoinder affirming the defense of the plea by denying the substance of the replication, without re-affirming an immaterial averment of value in the plea, is not a departure. *Burr v. Baldwin*, 2 *Wend.* 681.

30. Duplicity.—A replication which alleges two distinct and dependant facts, either of which is a complete answer to the plea, is double, and is bad on special demurrer. *Burnham v. Webster*, *Davies*, 236; and see *Craig v. Brown*, *Pet. C. Ct.* 443.

31. Goods Sold.—To a complaint charging acceptance of goods purchased to have been procured by the fraudulent representations of the seller, without examination by the buyer, the defendant answered denying the fraud, and alleging that the buyer had examined the goods and had full knowledge of their quality. The reply admitted an examination of the goods by the plaintiff, and a knowledge of certain facts indicating the defect complained of, but averred that he relied on defendant's representations, and that the defendant had subsequently promised to pay the damages claimed: *Held*, that the reply was a departure, and that objection could be taken to it by demurrer. *McAroy v. Wright*, 25 *Ind.* 22.

32. Insurance Policy.—The declaration on a policy of insurance averring a total physical loss, a replication of survey and condemnation after arrival at the port of destination is a departure. *Griswold v. National Ins. Co.*, 3 *Cow.* 96.

33. Obstructing Highway.—An indictment for obstructing a highway alleged in the first count the obstruction of a road "leading from S.'s gate to B.'s house," and in the second count the obstruction of a road leading "from S.'s gate toward the turnpike." A replication averring that the road ran "from S.'s gate to the turnpike" was held a

departure, as the former averred the existence of a public road, while the latter did not. *State v. Price*, 21 *Md.* 449.

34. Withdrawal of Plea.—Where a plaintiff replies to a plea, and his replication being demurred to is held to be insufficient, and he withdraws that replication and substitutes a new one—the substituted one being complete in itself, not referring to or making part of the one which preceded—he waives the right to question in the Supreme Court the decision of the court below, on the sufficiency of what he had at first replied. The same is true when he abandons a second replication, and with leave of the court files a third and last one. *Clearwater v. Meredith*, 1 *Wall U.S.* 25.

CHAPTER IX.

JUDGMENT ON PLEADINGS.

No. 1016.

Notice of Motion for Judgment on the Pleadings.

[TITLE.]

Please take notice that plaintiff will, on the day of, 18.., at the Court House, in the City of, and at the hour of . . . o'clock of said day, or as soon thereafter as counsel can be heard, move the Court for judgment on the pleadings in said action, on the ground that the answer filed therein is frivolous [*or state other grounds*]. This motion will be based upon the pleadings on file in said action.

1. Defective Answer.—When an answer is put in, defective in form only, plaintiff should demur, and not move for judgment on the pleadings. (*Gallagher v. Dunlap*, 2 *Nev.* 326; *Childs v. Griswold*,

15 *Iowa*, 438.) If, instead of demurring, advantage be taken of a defective pleading by motion for judgment, the Court should permit an amendment of the pleading, where an amendment will cover the defect, the same as if a demurrer had been interposed. *Cal. State Tel. Co. v. Patterson*, 1 *Nev.* 151.

2. Denial.—It does not follow, because defendant makes no denial of any allegation in the complaint, that this is such an admission of the cause of action, and that a judgment contrary to the admission is erroneous, if affirmative matter of defense is stated. (*Newell v. Doty*, 33 *N.F.* 83.) If the answer contains a denial of the material facts alleged as a cause of action in the complaint, and a special defense stated separately, the plaintiff is not entitled to a judgment on the pleadings, even if the entire cause of action is confessed in the special defense. (*Nudd v. Thompson*, 34 *Cal.* 39.) As to what admissions are conclusive against the defendant, see 12 *Cal.* 403; 15 *Cal.* 638; 18 *Cal.* 433; 19 *Cal.* 28; 22 *Cal.* 86, 229; 31 *Cal.* 115, 238; and the late case of *Chamon v. San Francisco*, cited in *Nunan v. San Francisco*, *Cal. Sup. Ct., Oct. T.*, 1869; consult, also, "*Admissions in the Answer*," Vol. ii., pp. 667–8.

3. Demurrer must be Disposed of.—When a demurrer is filed to defendant's answer, it is irregular for plaintiff to take judgment before some disposition is made of the demurrer; (*Huse v. Moore*, 20 *Cal.* 115; *Calderwood v. Tevis*, 23 *Id.* 335;) as the demurrer must be disposed of before the issue of fact is tried (*Ellis v. Loumier*, 1 *Mo.* 260), and before judgment on the merits can be rendered. (*Manifee v. D'Lashnutt*, 1 *Mo.* 258.) But if no objection is made at the time of trial, it is not such an irregularity as entitles the plaintiff to a new trial. *Calderwood v. Tevis*, 23 *Cal.* 335.

4. Discretion.—Motions for judgment in the pleadings are allowed in the discretion of the Court. (*Willson v. McDonald*, *Cal. Sup. Ct., Jul. T.*, 1869.) Such motions can be allowed only where the answer wholly fails to deny any material allegation of the complaint. (*Willson v. McDonald*, *Cal. Sup. Ct., Jul. T.*, 1869.) Vagueness is not visited by judgment. *Barnett v. Kelly*, 16 *How. Pr.* 135.

5. Frivolous Answer.—*It seems* that the plaintiff cannot move for a judgment under Section 247 of the Code, unless the answer as an entirety is frivolous. If it contains several defenses, some well pleaded

and some insufficient, the latter should be demurred to, or moved to be stricken out, as the case may be. (*Van Valen v. Lapham*, 13 *How. Pr.* 240.) But if parts only are bad, relief is to be had by a motion of a different character, under Sections 152 or 160. It is true that there may be no objection to combining both of these applications in one motion, but in that case whether judgment on the whole answer can be granted must depend on whether the parts of the pleading objected to are stricken out, and, if they are, whether the whole answer as it then remains be frivolous. (*Lockwood v. Salhenger*, 18 *Abb. Pr.* 136.) When an answer sets up four defenses, two of which tendered issues with the complaint, and two of which, in hypothetically admitting the averments of the complaint, averred matter in avoidance, upon motion: *Held, First*, That the two hypothetical defenses must be stricken out; *Second*, That as there was enough left in the answer to put the plaintiff to proof of his case, it was unnecessary to allow an amendment. (*Hamilton v. Hough*, 13 *How. Pr.* 14.) Vagueness in pleading is not frivolousness; it is to be corrected by amendment. (*Kelly v. Barnett*, 16 *How. Pr.* 135.) As to what answers are deemed frivolous, consult Vol. ii., p. 662, *et seq.*

6. Election.—Where the defendants serve a pleading containing matter in answer and matter in demurrer to the complaint, they should be compelled to elect between the two. (*Spellman v. Weider*, 4 *How. Pr.* 373; 3 *Code R.* 59; *Strauer v. The Ocean Insurance Co.*, 16 *How. Pr. R.* 422.) So, where a demurrer to a plea is overruled, and the plaintiff does not obtain leave to withdraw it and file a replication, it amounts to an election to stand on the demurrer, and judgment should be rendered for the defendant. *Marshall v. Platte Co.*, 12 *Mo.* 88.

7. General Rule.—The general rule is that, notwithstanding the particular pleading demurred to may be defective, the Court will examine all the pleadings in the cause, and render judgment against the party chargeable with the earliest substantial fault in pleading. (*Cooke v. Graham*, 3 *Cranch*, 229; *United States v. Gurney*, 4 *Id.* 333; *United States v. Arthur*, 5 *Id.* 257; *Sprigg v. Bank of Mount Pleasant*, 10 *Pet.* 257; affirming S.C., 1 *McLean*, 178; *Gorman v. Lenox*, 15 *Pet.* 115; *United States v. Sawyer*, 1 *Gall.* 86; *Bockee v. Crosby*, 2 *Paine*, 432; *Egberts v. Dibble*, 3 *McLean*, 86; *Bank of Illinois v. Brady*, 3 *Id.* 268; *Greathouse v. Dunlap*, *Id.* 303; *Hart v. Rose*, *Hempst.* 238; *McCue v. Corporation of Washington*, 3 *Cranch C. Ct.* 639.) As a de-

murrer brings up the sufficiency of all pleadings which have preceded it. (Marshall v. Platte Co., 12 Mo. 88.) But this rule applies only to substantial defects. The fault must be one that is bad on general demurrer. (Jackson v. Rundlett, 1 Woodb. & M. 381.) It applies only while the proceedings are pending and under the control of the Court. Upon a demurrer, therefore, to a second *scire facias*, defects in the former cannot be urged. Dickson v. Wilkinson, 3 How. Pr. 59.

8. Going Back to First Fault—On demurrer to the answer for insufficiency, the defendants may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action. (Pardo v. Osgood, 2 Abb Pr. (N.S.) 365; People v. Booth, 32 N.Y. 397.) Where the general issue has been pleaded, and special pleas also, a demurrer to a special plea will not be carried back to the declaration. Ward v. Stout, 32 Ill. 399.

9. Judgment for Plaintiff—Upon a demurrer to a bad plea, the Court will give judgment against the plaintiff, if the declaration is bad. (Leslie v. Harlow, 18 N.H. 518; Ward v. Stout, 32 Ill. 399; Balcombe v. Northrup, 9 Min. 172.) Where a demurrer is filed to a replication, and the plea is bad, judgment should be given for the plaintiff. Townsend v. Jemison, 7 How. Pr. 706.

10. On Demurrer—On demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue of fact, joined upon the same pleading, and found in favor of the same party; and judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; because, upon the whole, it appears that the plaintiff had no cause of action. (Clearwater v. Meredith, 1 Wall. 25.) On demurrer, judgment must be given against the party who made the first material error. Collier v. Wheldon, 1 Mo. 1; Wimer v. Shelton, 7 Id. 266; Clark v. Murphy, 1 Id. 114.

11. Verified Answer—A verified answer, which in any part contains a distinct denial of a fact material to plaintiff's recovery, cannot, whatever its defects, be treated as a nullity, so as to entitle plaintiff to judgment on the pleadings. Ghirardelli v. McDermott, 22 Cal. 539.

PART EIGHTH.

TRIAL AND ITS INCIDENTS.

CHAPTER I.

ISSUES.

1. When the pleadings in an action (the complaint and answer) are made up, the question first to be arrived at before going into trial is: What are the issues to be tried? This proposition must be carefully examined and clearly understood before the parties can prepare for trial, for if the true issue or issues are not understood by counsel for the plaintiff or defendant, the one cannot prepare intelligibly for the prosecution of his claim, nor the other for his defense. Certain steps are necessary to be taken on the part of the plaintiff to establish his claim against the defendant.

2. The bare fact that the plaintiff has suffered an injury does not always entitle him to the relief asked for in his complaint; hence it becomes a question of chief importance to so frame the issue in the pleadings that he may obtain the relief to which the nature of the injury entitles him. He, being the moving party, must be prepared to so present his case that he can show: *First*, That the defendant did the injury. *Second*,

He must show the same character of injury which the complaint mentions. *Third*, The amount of the damage done, and that it is the same described in the complaint. *Fourth*, He must show that the issue made by the pleadings is sustained by the proofs—that is, he cannot prove a cause of action not pleaded; and hence the familiar rule that the *allegata* and *probata* must agree.

3. By issues is meant the fact of difference between plaintiff and defendant. In one action there may be a number of issues, each of which are vital and necessary to be tried to make out plaintiff's cause. They are integral parts of one whole, and if plaintiff fails to plead or prove each of these necessary parts, his action falls. Each is a link in the chain of circumstances which makes up in detail the whole case. It is, therefore, the better practice for an attorney to make a note of each step to be taken in the course of the trial before going into court, and to do that he must take for his guide the issue in the cause. This is necessary, because the parties to the action, if informed of the facts necessary to be proved to make out their case, need only bring into court such evidence as will effect the purpose, and not, as is often done, be firing at random, apparently without object, and certainly without success.

4. In most causes the real points will thus be greatly narrowed down, and it will require but few witnesses or a comparatively small amount of evidence to sustain the action, if there be merit in it, and hence counsel should know before going into court, as far as possible, what he *wants* to prove, and second if the whole *issue* is made up of parts, analyze them, and then make the proofs in the *order* in which they ought to be

presented to the court or jury. In many cases it is of vast importance to present the proofs in *logical* order, which means the *natural* order, and this should be a point of no small interest to the practitioner, for if logically presented, unprofessional minds like jurors will grasp the ideas with more readiness, and the judge or professional listener will comprehend the relevancy of the testimony without comment or explanation.

JOINDER OF ISSUE.

5. The authorities generally define an issue to be a single, certain, and material point, issuing out of the allegations or pleas, consisting regularly of an affirmative and negative. (2 *Burr. Dict.* 99; *Co. Litt.* 126, *a*; see 3 *Black. Com.* 313; *French Law.* 336; *Story Eq. Pl.* § 1; *Steph. on Pl.* 124; 1 *Van Santv. Pl.* 733; 1 *Chitt. Pl.* 652.) While an immaterial issue is one taken on an immaterial point, and not necessary to decide the action. (*Steph. Pl.* 129; 1 *Chitt. Pl.* 692; 2 *Tidd's Pr.* 921; *Gould Pl.*, Ch. vi., § 27; *Stafford v. Mayor of Abb.*, 6 *Johns.* 1; *Swift v. Vaughn*, 6 *Hill*, 488; *Mallory v. Lamphear*, 8 *How. Pr.* 491.) An issue is joined where there is a direct affirmation or denial of the fact in dispute, and it makes no difference whether the affirmative or the negative is first averred. (*Van Giesen v. Van Giesen*, 12 *Barb.* 520; 1 *C. R. (N.S.)* 414.) Where nothing is in fact controverted, no issue is joined. *Pardee v. Schenck*, 11 *How. Pr.* 500.

6. The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise,

and that the jury may not be misled by the introduction of various matters. (*Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46.) The pleadings having been made up, the cause is at issue. An issue arises when a fact or conclusion of law is maintained by the one party, and is controverted by the other. Issues are of two kinds: *First*, Of law; and, *Second*, Of fact. *Cal. Pr. Act*, § 151; *N.Y. Code*, § 248.

ISSUES OF LAW.

7. An issue of law arises upon a demurrer to the complaint, or answer, or to some part thereof. (*Cal. Pr. Act*, § 152; *N.Y. Code*, § 249; *Laws of Oregon*, § 172; *Laws of Idaho*, § 152; *Laws of Wash. Terr.* § 195; *Code of Arizona*, § 154; 3 *Black. Com.* 314; 3 *Steph. Com.* 572.) And is tried by the Court, unless referred by consent. (*Cal. Pr. Act*, § 154; *N.Y. Code*, § 253.) A court cannot properly, even by consent of parties, pass upon questions not raised by the written allegations of the pleadings. (*Boggs v. Merced Mi. Co.*, 14 *Cal.* 279.) Where, however, a partial issue of law will involve a disposition of the whole case, it has been held that an immediate reference on that specific point is admissible, and plaintiff should apply for one, instead of waiting to bring on the case regularly. (*Groshon v. Lyons*, 1 *C.R. (N.S.)* 348; *Farmers' Loan and Trust Co. v. Hunt*, 1 *C.R. (N.S.)* 1.) Where an issue of law goes to only a portion of a pleading, the case may be put on the calendar for trial of the issue of fact, joined by other portions, without waiting for the decision of the former. *Palmer v. Smedly*, 13 *Abb. Pr.* 185.

ISSUES OF FACT.

8. An issue of fact is an issue taken upon or consisting of matters of fact, the fact only, and not the law being disputed. (3 *Black. Com.* 314; *Co. Litt.* 126, a; 3 *Steph. Com.* 572.) Such issues arise: *First*, Upon a material allegation in the complaint, controverted by the answer. *Second*, Upon new matters in the answer, except an issue of law is joined therein. (*Cal. Pr. Act*, § 153; *N.Y. Code*, § 250; *Laws of Oregon*, § 173; *Laws of Idaho*, § 153; *Laws of Wash. Terr.* § 196; *Code of Arizona*, § 155.) Issues of fact are tried by a jury, unless a jury trial is waived or a reference be ordered. (*Cal. Pr. Act*, § 155.) They are made by the pleadings, and should be submitted to the jury as thus made. (*Bankston v. Ferris*, 26 *Mo.* 175; *Overton v. Webster*, *Id.* 332.) Where the issue of fact had been in fact tried first, it has been held that the Court will presume a direction. *Warner v. Wigers*, 2 *Sandf.* 635.

MIXED ISSUES OF LAW AND FACT.

9. Where there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of. (*Cal. Pr. Act*, § 155; *N.Y. Code*, § 253; *Laws of Oregon*, § 174; *Laws of Idaho*, § 155; *Laws of Wash. Terr.* § 197; *Code of Arizona*, § 158.) When there is both a demurrer and an answer to the same complaint, the issue of law raised by the demurrer must be first disposed of. (*Brooks v. Douglass*, 32 *Cal.* 208.) Where the law applicable to a case has been altered by the Legislature pending the action, the Court will dispose of issues of law arising on a demur-

rer according to the law at the time of the trial of the issues, if it does not appear upon the face of the complaint when the action was commenced. 11 *Barb.* 569; 19 *N.Y.* 271; *Lewis v. City of Buffalo*, 29 *How. Pr.* 335.

10. In general, questions compounded of law and fact should be submitted to the jury. *Lytle v. Lee*, 5 *Johns.* 112; *Foot v. Wiswell*, 14 *Id.* 304.

11. When the answer contains legal and equitable defenses, the Court may first try the equitable defense, and refuse plaintiff a jury trial, and if the facts warrant, grant the equitable relief prayed for. (*People v. Lafarge*, 3 *Cal.* 130; *Bodley v. Ferguson*, 30 *Cal.* 511.) It should distinctly appear from the record that the equitable defenses were first tried and disposed of, or if the whole action and all the issues were tried and submitted together, the fact should appear. (*Martin v. Zellerbach*, *Cal. Sup. Ct., Jul. T.*, 1869.) Where mixed issues have been joined, the course will be to set down the case for general trial, and either to bring the issues of law preliminarily, or ask the Court for directions as to the mode and order of trial. *Warner v. Wigers*, 2 *Sandf.* 635. *Fry v. Bennett*, 9 *Abb. Pr.* 45.

SPECIAL ISSUES.

12. A special issue is one produced upon a special plea; (*Steph. Pl.* 162;) and is usually more specific and particular than the general issues. (*Id.*) Where a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority neces-

sary for a trial. (*Cal. Pr. Act*, § 3.) The Court may direct an issue to be framed upon the pleadings and submitted to the jury. (*Curtis v. Sutter*, 15 *Cal.* 263; *Weber v. Marshall*, 19 *Id.* 447; *Moffatt v. Moffatt*, 10 *Bosw.* 468; 17 *Abb. Pr.* 4; *McCarty v. Edwards*, 24 *How. Pr.* 236.) And such special issues framed by the Court according to chancery practice may be tried by a jury in equity cases. *Brewster v. Bours*, 8 *Cal.* 505.

13. When, upon the coming in of the report of an auditor, either party desires to try the case by a jury, if there has not been an issue of fact joined between the parties, suitable issues should be made up under the direction of the Court. (*Brewer v. Hindman*, 18 *N.H.* 9.) The proper mode of making up such an issue is for the party having the affirmative to file an allegation of the facts which he asserts, and for the other party to traverse it. It is not a proper course for a party to traverse the conclusions of the auditor. *Id.*

QUESTIONS WHICH RAISE AN ISSUE OF LAW.

14. **Account.**—What constitutes an account stated is a question raising an issue of law. *Lockwood v. Thorn*, 1 *Kern.* 170.

15. **Adverse Possession.**—The facts to establish adverse possession are to be found by the jury, but what constitutes adverse possession is a question of law. *Macklot v. Dubreuil*, 9 *Mo.* 473; *Bovie v. Brahe*, 3 *Duer*, 35; *Jackson v. Walker*, 7 *Cow.* 637; *Munro v. Merchant*, 26 *Barb.* 383.

16. **Agreement.**—Whether letters which have passed between parties constitute an agreement; (*Lockhart v. Ogden*, 30 *Cal.* 547;) whether an agreement between parties amounts to an extension of time for the performance of a former contract between them, and if so, what time, are questions of law for a court, and not of fact for a jury. *Id.*

17. Assignment.—The legal effect of an assignment; (*Goodrich v. Downs*, 6 *Hill*, 438; *Sheldon v. Dodge*, 4 *Den.* 217; *Cunningham v. Freeborn*, 11 *Wend.* 240;) of a chattel mortgage; (*Spies v. Boyd*, 1 *E. D. Smith*, 445; 11 *N.Y. Leg. Obs.* 54; *Edgell v. Hart*, 9 *N.Y.* 213;) are questions of law.

18. Boundary.—The question of the boundary line of the pueblo (*Payne v. Treadwell*, 16 *Cal.* 220) is a question of law. See *Post*, Notes 61, 69.

19. Carelessness.—What facts and circumstances constitute evidence of carelessness. *Gerke v. Cal. Steam Nav. Co.*, 9 *Cal.* 251.

20. Compliance.—Whether one claiming a discharge in insolvency has strictly complied with the provisions of the Insolvent Act (*Schloss v. His Creditors*, 31 *Cal.* 201) is a question of law.

21. Contract.—Whether a contract has been rescinded or not, as whether the undisputed acts of parties amount to a rescission; (*Healy v. Utley*, 1 *Cow.* 345;) also what a contract means (*Latham v. Westervelt*, 26 *Barb.* 256), or its construction (*Thomas v. Dickenson*, 23 *Barb.* 431), and the validity and effect of a contract, are questions raising an issue of law. (*Chapin v. Potter*, 1 *Hill.* 366.) But when the meaning is to be judged by facts *aliunde*, it is a question for the jury. *Gardner v. Clark*, 17 *Barb.* 538.

22. Due Diligence.—Due diligence is sufficiently defined to enable courts to determine whether any given state of facts is sufficient to constitute it or not. *Ophir Co. v. Carpentier*, 4 *Nev.* 534; see *Carroll v. Upton*, 3 *Const.* 272.

23. Evidence.—Admissibility of evidence is a question for the Court. (*People v. Glenn*, 10 *Cal.* 32; *Gould v. Weed*, 12 *Wend.* 12; compare *Larue v. Rowland*, 7 *Barb.* 107; see, also, *Harris v. Wilson*, 7 *Wend.* 57.) Or of a witness objected to for interest. (*Tabor v. Staniels*, 2 *Cal.* 240.) Or whether a witness is competent. (*Reynolds v. Lounsbury*, 6 *Hill*, 534; *Scherpf v. Szadczky*, 1 *Abb. Pr.* 366; *Prall v. Hinchman*, 6 *Duer*, 351.) Or whether a paper is proper to be read. (*Tillon v. Clinton and Essex Mut. Ins. Co.*, 7 *Barb.* 564.) Whether evidence offered tends in any respect to make out fraud. (*Gage v. Parker*, 25 *Barb.* 141; *Erwin v. Voohees*, 26 *Id.* 126.) In slander, if there is no dispute as to the facts, the question whether the testimony

given by plaintiff was material to the point in issue. *Powers v. Price*, 16 *Wend.* 450.

24. Fraud.—When there is no dispute upon the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury. *Chenery v. Palmer*, 6 *Cal.* 119; *Sturtevant v. Ballard*, 9 *Johns.* 337; *Jennings v. Carter*, 2 *Wend.* 446; *Gage v. Parker*, 25 *Barb.* 141; *Erwin v. Voohees*, 26 *Barb.* 127; *Edgell v. Hart*, 9 *N.F.* 213.

25. Grant.—The construction of the terms of a grant; (*Frier v. Jackson*, 8 *Johns.* 495;) as to the validity and effect of a Mexican grant; (*Seward v. Malotet*, 15 *Cal.* 304;) as to its loss and contents; (*Id.*;) as to the effect of mesne conveyance through which plaintiff claimed under the grant; (*Id.*;) if there is no dispute about the facts, the question what premises are embraced by the terms of the instrument; (*St. John v. Bumpstead*, 17 *Barb.* 100;) are questions for the Court. But whether upon a given state of facts a grant of an easement is to be presumed from lapse of time, is a question for the jury, under instructions as to the law. *Parker v. Foote*, 19 *Wend.* 309.

26. Insurance.—Whether preliminary proofs of loss of vessel are sufficient to satisfy requirements of policy, and whether facts shown amount to a waiver of defects in the proofs (*Miller v. Eagle Life and Health Ins. Co.*, 2 *E. D. Smith*, 268), are questions for the Court. See Notes 72, 97.

27. Interest.—The right to interest (*Liotard v. Graves*, 3 *Cal.* 226; *Kobinson v. Corn Exc. Ins. Co.*, 1 *Abb. Pr. (N.S.)* 186) is a question of law. But whether interest should or should not be included in assessment of damages in tort (*Black v. Camden and Amboy R.R. Transportation Co.*, 45 *Barb.* 40) is a question for the jury.

28. Judgment.—Whether a judgment was properly entered (*Leese v. Clark*, 28 *Cal.* 26) is a question of law, but the issue of *nul tiel record* is for the jury. *Fasnacht v. Stehn*, 53 *Barb.* 650; 5 *Abb. Pr. (N.S.)* 338.

29. Jurisdiction.—Whether the proceedings of the Probate Court showed jurisdiction to make certain orders (*Seaward v. Malotte*, 15 *Cal.* 304) is a question of law.

30. Libel.—Whether the article is libelous on its face is a question for the Court. (*Matthews v. Beach*, 5 *Sandf.* 256.) But whether the

language is capable of bearing the meaning assigned by the Court, or whether the meaning is truly assigned to the language, is for the jury. *Blagg v. Stuart*, 10 *Q. B.* 899; *Broome v. Gosden*, 1 *C. B.* 728; *Barrett v. Long*, 3 *House of Lords Cas.* 395; *Babonneau v. Farrell*, 15 *C. B.* 360; *Hemmings v. Gason*, 5 *Irish Law R.* 498; see *Post*, Note 74.

31. Mining Laws.—The construction of mining laws, when introduced in evidence (*Fairbanks v. Woodhouse*, 6 *Cal.* 433), is a question for the Court. See Note 45.

32. Negligence.—Where facts are ascertained, whether they amount to negligence. *Foot v. Niswall*, 14 *Johns.* 304; *Moore v. Westervelt*, 2 *Duer*, 59; 1 *Bosw.* 357; *Dascomb v. Buffalo and State Line R.R. Co.*, 27 *Barb.* 221; *Stevens v. Oswego and Syracuse R.R. Co.*, 18 *N.Y.* 422; *Mackey v. N.Y. Cent. R.R. Co.*, 27 *Barb.* 528; *Brooks v. Buffalo and Niagara R.R. Co.*, 27 *Barb.* 532; *Brendell v. Buffalo State Line R.R. Co.*, *Id.* 534.

33. New Promise.—Where the facts are undisputed, it is for the Court to determine whether a sufficient promise has been made to take the case out of the Statute. *Clarke v. Dutcher*, 9 *Cow.* 674.

34. Notice.—The sufficiency of the notice of the dishonor of a note, where there is no dispute about the facts (*Cayuga Co. B'k v. Warden*, 2 *Seld.* 29; *Dole v. Gold*, 2 *Barb.* 490; *Farmers' B'k v. Vail*, 21 *N.Y.* 487), is a question of law. So, the question whether the notice was given within a reasonable time. (*Bryden v. Bryden*, 11 *Johns.* 187; *Tindall v. Brown*, 1 *T. R.* 167; *Williams v. Smith*, 2 *B. & Ald.* 496; *Schiebel v. Fairburn*, 1 *Bos. & Pul.* 388.) Or, whether the holder used due diligence to find the drawer or indorser. (*Bank of Utica v. Bender*, 21 *Wend.* 643; *Spencer v. Bank of Salina*, 3 *Hill*, 520; *Carroll v. Upton*, 3 *N.Y.* 272; *Hunt v. Maybee*, 7 *N.Y.* 266.) So, whether a written notice of protest is sufficient in terms to charge an indorser. *Remer v. Downer*, 23 *Wend.* 620; *Ransom v. Mack*, 2 *Hill*, 587; *Dole v. Gold*, 5 *Barb.* 490; 7 *N.Y. Leg. Obs.* 247; *Cayuga Co. B'k v. Warden*, 9 *N.Y.* 19; *Cook v. Litchfield*, 9 *N.Y.* 279; see *Post*, Note 80.

35. Parties.—The question as to proper parties plaintiff (*Seaward v. Malotte*, 15 *Cal.* 304) is a question of law.

36. Partnership.—If facts are undisputed, the question of partner-

ship is for the Court. *Cumpston v. McNair*, 1 *Wend.* 457; see *Post*, Note 82.

37. Payment.—Where there is no evidence that a note was expressly received in absolute payment of a debt, whether it was received in payment or not is a question for the Court. *Small v. Smith*, 1 *Den.* 583.

38. Probable Cause, Reasonable Cause.—Are questions of law. (1 *T.R.* 542; 1 *Gale & D.* 504; 2 *Ad. & E.* 169; *Bulkley v. Ketaltas*, 1 *Hill.* 45; 2 *Seld.* 384; *Ransford v. Copeland*, 5 *Ad. & El.* 482; *Carpenter v. Sheldon*, 5 *Sandf.* 77; *Gordon v. Upham*, 4 *E. D. Smith*, 9; *Waldham v. Sichel*, 1 *Hill.* 45; *Bulkeley v. Smith*, 2 *Duer*, 261; 11 *N.Y. Leg. Obs.* 300; *Besson v. Southard*, 10 *N.Y.* 236; *McCormick v. Sisson*, 7 *Cow.* 715; *Pangburn v. Bull*, 1 *Wend.* 345; *Masten v. Deyo*, 2 *Id.* 424; *Hall v. Suydam*, 6 *Barb.* 83; *Stevens v. Lacour*, 10 *Id.* 62.) Probable cause is a mixed question of law and fact. (See *Potter v. Seale*, 8 *Cal.* 217; *Grant v. Moore*, 29 *Cal.* 644; *Brandt v. Higgins*, 10 *Mo.* 728.) So, want of cause, in an action for malicious prosecution. *Grant v. Moore*, 29 *Cal.* 644.

39. Receipt.—Whether a receipt is a bailment or sale; (*Wadsworth v. Allcott*, 6 *N.Y.* 64;) the facts being undisputed, and no fraud shown, the question of the effect of a receipt as establishing an accord and satisfaction; (*Vedder v. Vedder*, 1 *Den.* 257; *Wadsworth v. Allcott*, 6 *N.Y.* 64;) are questions of law.

40. Statute of Frauds.—That facts show no valid sale of property for want of change of possession (*Ford v. Chambers*, 19 *Cal.* 143) is a question for the Court.

41. Waste.—Whether the question what amounts to a waste is a question of law or fact, *Jackson v. Browner*, 7 *Johns.* 227; *Cooper v. Stower*, 9 *Id.* 331; *Jackson v. Tibbits*, 3 *Wend.* 341; *Kidd v. Dennison*, 6 *Barb.* 9; *McGregor v. Brown*, 10 *N.Y.* 114.

42. Written Instrument.—That a written instrument is or is not a mortgage; (*Fairbanks v. Bloomfield*, 2 *Duer*, 353;) the legal effect of written documents; (*Carpentier v. Thirston*, 24 *Cal.* 268;) are questions of law.

QUESTIONS WHICH RAISE AN ISSUE OF FACT.

43. Abandonment.—When, in ejectment on prior possession, abandonment is pleaded, and evidence on it is introduced, the question of adverse possession is for the jury. (*Roberts v. Unger*, 30 *Cal.* 676; *Jackson v. Joy*, 9 *Johns.* 102.) So of mining claims; (*Warring v. Crow*, 11 *Cal.* 371;) whether evidence is accepted or not. *Bell v. Smith*, 2 *Johns.* 98.

44. Appurtenances.—What are appurtenances of a steamboat is a question of fact for the jury. *Amis v. St. Bt. "Louisa,"* 9 *Mo.* 621.

45. Assent.—Whether a party has assented to acts of the Sheriff. (*Moore v. Westervelt*, 2 *Duer*, 59.) So, knowledge or assent, generally, is a question of fact. *Weaver v. Paige*, 6 *Cal.* 681; *Bensley v. Atwill*, 12 *Id.* 231; see *Post*, Note 96.

46. Baggage.—Whether articles of a doubtful character are to be deemed as baggage (*Grant v. Newton*, 1 *E. D. Smith*, 95) is a question of fact.

47. Bill of Exchange.—That a bill was presented for payment, and payment demanded (*Graham v. Machado*, 6 *Duer*, 514), is a question of fact.

48. Charter Parties.—Where the question depends upon circumstances peculiar to the pursuit in which the vessel was engaged; (*Child v. Sun Mut. Ins. Co.*, 3 *Sand.*;) the usual length of a voyage; *Mackay v. Rhineland*, 1 *Johns. Cas.* 408;) are questions of fact.

49. Compensation.—In suit for services rendered, whether such services were intended to be gratuitous (*Pendleton v. Empire Stone Dressing Co.*, 19 *N.Y.* 13), is a question for the jury.

50. Compulsion.—The question of compulsion in the ejection of a passenger from a railroad car is one for the jury. *Kline v. C.P. R.R. Co. of Cal.*, *Cal. Sup. Ct., Apl. T.*, 1869.

51. Contract.—Whether a contract was made, is a question for the jury. (*Latham v. Westervelt*, 26 *Barb.* 256.) So, whether words

used by the defendant amounted to a ratification of the contract. *Bay v. Gunn*, 1 *Den.* 108.

52. Conversion.—The time of the conversion; (*Hyde v. Stone*, 9 *Cow.* 230;) so, on the amount of damages in action for the detention of personal property; (*Bartlett v. Hogden*, 3 *Cal.* 55;) so, that a thing was unlawfully converted; (*Covell v. Hill*, 2 *Seld.* 381; *Decker v. Mathews*, 2 *Rem.* 324;) are questions for the jury.

53. Custom.—Whether such a custom existed or not (*Panaud v. Jones*, 1 *Cal.* 500) is a question of fact.

54. Damages.—The amount to be awarded to one who has suffered an illegal arrest should be left to the jury, in view of all the circumstances. *Garrison v. Pearce*, 3 *E.D. Smith*, 255.

55. Death of Parties.—Where the death of one of the defendants is put in issue by the pleadings, it should, like every other issue of fact, be left to the jury. *Fowler v. Houston*, 1 *Nev.* 469.

56. Deceit.—Whether representations inducing plaintiff to sell goods were sufficient (*Moore v. Meacham*, 10 *N.Y.* 207; *People v. Dalton*, 2 *Wheel. Cr.* 161; *Woodworth v. Kissam*, 15 *Johns.* 186; *Buckley v. Artcher*, 21; *Barb.* 585) is a question of fact.

57. Dedication.—What amounts to a dedication of homestead is a question of fact. (*Cook v. McChristian*, 4 *Cal.* 23.) So of the dedication of land for a street. *Harding v. Jasper*, 14 *Cal.* 648; see *Allemany v. Petaluma*, *Cal. Sup. Ct., Oct. T.*, 1869.

58. Delivery of Goods.—Whether absolute or conditional, is a question of fact. *Houghtaling v. Ball*, 19 *Mo.* 84; *Fleeman v. McKean*, 25 *Barb.* 474; *Downer v. Thompson*, 6 *Hill*, 208.

59. Description of Land.—Whether the land, as described in the deed given in evidence, is the same as that described in plaintiff's declaration, is a question for the jury. (*Lawless v. Newman*, 5 *Mo.* 236; *Newman v. Lawless*, 6 *Id.* 279.) So, where parol evidence is resorted to, to identify the calls of a survey, the facts must be found by the jury. *Ott v. Soulard*, 9 *Mo.* 573.

60. Diligence and Care is a question of fact for the jury. (*Richmond v. Sac. Vall. R.R. Co.*, 351.) Ordinary Care. (*Amyar v.*

Astor, 6 *Cow.* 267.) So of diligent inquiry. *Carroll v. Upton*, 3 *Coms.* 274.

61. Election or Intention is a question of fact for the jury. *Clift v. White*, 2 *Kern.* 538; *Moss v. Riddle*, 5 *Cranch*, 351; *Griffin v. Cranston*, 1 *Bosw.* 281; *Miller v. The People*, 5 *Barb.* 203; 18 *N.Y.* 297; 20 *Barb.* 549; 21 *N.Y.* 12.

62. Evidence.—The weight of evidence is a question for the jury. (*Battersby v. Abbott*, 9 *Cal.* 565; *Whitney v. The State*, 8 *Mo.* 165; *Winston v. Wales*, 13 *Mo.* 569; *Magoon v. Whitney*, 1 *Mo.* 613; *Van Ness v. Packard*, 2 *Pet.* 138; *Seligman v. Kalkman*, 8 *Cal.* 216; *People v. Dick*, 32 *Cal.* 213; *Same Parties*, 34 *Cal.* 663; *Patterson v. McClanahan*, 13 *Mo.* 507; *Chamberlin v. Smith*, 1 *Mo.* 482; *Tuttle v. Buck*, 41 *Barb.* 417.) Whether evidence is sufficient to prove execution of a bond. (*Hicks v. Chauteau*, 12 *Mo.* 341.) It is for the jury, and not the Court, to construe the meaning of an ambiguous reply to a question in a deposition. *Marine Ins. Co. of Alex. v. Young*, 5 *Cranch*, 187.

63. Fact.—As to the existence or a non-existence of a fact, where there is any conflict, it is a question for the jury. (*Sheldon v. At. Fire and Mar. Ins. Co.*, 26 *N.Y.* 470; *Butler v. Murray*, 30 *N.Y.* 88; *Smith v. Tiffany*, 33 *Barb.* 23; *Taylor v. Allen*, 36 *Id.* 294; *Smith v. Brounell*, 39 *Id.* 370; *Abbey v. Deyo*, 44 *Id.* 374; *McNaughton v. Cameron*, *Id.* 406; *Place v. McIlvan*, 1 *Daly*, 266.) So the existence or non-existence of facts constituting an estoppel. *Brown v. Bowen*, 30 *N.Y.* 319; *McIntyre v. Clapp*, 31 *Id.* 569.

64. Fixtures.—Whether personal property has been annexed to the freehold, or whether it was so annexed for the purposes of trade only, is a question of fact. *Hovey v. Smith*, 1 *Barb.* 372.

65. Foreign Law.—What is the law of a foreign country, is a question of fact. *Western v. Genessee Mutual Insurance Company*, 12 *N.Y.* 258.

66. Fraudulent Intent is a question of fact for the jury. (*Laws of Cal.* ¶ 3,167; 2 *Rev. Stat. of N.Y.* 134, § 4; *Seaman v. Mariani*, 1 *Cal.* 336; *Billings v. Billings*, 2 *Cal.* 107; *Ford v. Chambers*, 19 *Id.* 143; *Wellington v. Sedgwick*, 12 *Cal.* 469; *Howard v. County of Crawford*, 6 *Pittsb. Leg. Int.* 454.) Whether omission to change pos-

session under sale or mortgage of chattels was with fraudulent intent. (*Prentiss v. Slack*, 1 *Hill*, 467; *Butler v. Van Wyck*, *Id.* 438; *Smith v. Acker*, 23 *Wend.* 653; *Cole v. White* 26 *Wend.* 511; *Swift v. Hart*, 12 *Barb.* 530; *Hanford v. Artcher*, 4 *Hill*, 271; *Murray v. Burtis*, 15 *Wend.* 212; *Butler v. Miller*, 1 *N.Y.* 496; *Stewart v. Slater*, 6 *Duer*, 83; *Thompson v. Blanchard*, 4 *N.Y.* 303; *Gardner v. McEwen*, 19 *N.Y.* 123; *Bishop v. Cook*, 13 *Barb.* 326; *Groat v. Rees*, 20 *Barb.* 26; compare *Edgell v. Hart*, 9 *N.Y.* 213.) The question whether a mortgage given for a greater sum than is due was given in good faith, both for a present indebtedness, and to secure future advance to be made, is one of fact for the jury, under proper instructions from the Court. (*Tully v. Harloe*, 35 *Cal.* 302.) It is only on proof of a good consideration that the cause goes to the jury on the question of fraud in fact. (*Allen v. Cowan*, 28 *Barb.* 99.) In an action to obtain chattels purchased at a sale on execution, the questions, whether there was an intent to defraud creditor; whether the property was in view of the bidders; whether it was offered in judicious lots, are questions of fact. (*Bruce v. Westvelt*, 2 *E. D. Smith*, 440.) Whether a transfer of the interest of a partner to his co-partner was made with intent to defraud creditors. (*Griffin v. Cranston*, 1 *Bosw.* 281.) Fraud in the procurement of an entry of land in a contest between two claimants from the United States. (*Waller v. Von Phul*, 14 *Mo.* 84.) Are questions of fact.

67. Grant.—The question what premises are embraced in a grant depending on evidence outside the grant, identity of landmarks referred to, is for the jury. *Trier v. Jackson*, 8 *Johns.* 495; see *Ante*, Note 18, 25.

68. Illicit Trade.—That a vessel was not engaged in an "illicit trade" is a question of fact. *Ocean Ins. Co. v. Francis*, 2 *Wend.* 72.

69. Instigation and Request are questions of fact. *Ives v. Humphreys*, 1 *E. D. Smith*, 200.

70. Insurance.—Whether circumstances not communicated to the insurer, on application for a policy, were material to the risk, and necessary to be communicated; (*Dougl.* 260, 396; 4 *Bos. & P.* 14, 151; 1 *Cai.* 229; 3 *Dall.* 491; 1 *Cond. Marsh.* 473; 6 *Cr.* 274, 338; *Fireman's Ins. Co. v. Waldon*, 12 *Johns.* 513; *Livingston v. Delafield*, 1 *Id.* 522; *Burritt v. Saratoga Co. Mut. Ins. Co.*, 5 *Hill.* 188; *Gates v. Madison Co. Mut. Ins. Co.*, 2 *N.Y.* 43;) the length of time usual for a vessel to perform a voyage; (*Mackay v. Rhineland*, 1 *Johns.*

Cas. 408;) whether vessel was lost within the time fixed in the policy; (*Brown v. Nelson*, 1 *Cal.* 525;) whether the preliminary proofs were furnished of the loss, or whether the acts were done which are relied on as constituting a waiver of defects in the proofs; (*Miller v. Eagle Life and Health Ins. Co.*, 2 *E. D. Smith*, 268;) whether erecting additional buildings increases the risk; (*Grant v. Howard Ins. Co.*, 5 *Hill*, 10;) whether keeping a small quantity of tow in a building amounts to using it for storing flax; (*Hynds v. Schenectady Co. Mut. Ins. Co.*, 16 *Barb.* 119; affirmed 11 *N.Y.* 554;) are questions for the jury. See *Ante*, Note 27; *Post*, Note 97.

71. Liability.—The liability of an employer for services under peculiar circumstances is a question for the jury. *Colgan v. Aymar, Hill & D. Supp.* 27.

72. Libel.—The truth of a libel is a question for the jury. (*King v. Root*, 4 *Wend.* 113.) Whether the disclosure by a public minister of his instructions is not *per se* traitorous. (*Genet v. Mitchell*, 7 *Johns.* 120.) Whether or not libelous article is applicable to the plaintiff. (*Green v. Telfair*, 20 *Barb.* 11.) The true interpretation of an ambiguous libel is a question for the jury, but if upon an examination of the whole writing and comparison of its different parts it appears to admit of no just construction except one injurious to the plaintiff, its meaning is to be determined by the Court. 9 *Barn. & C.* 643; 10 *Id.* 472; 5 *Johns.* 211; *Lewis v. Chapman*, 16 *N.Y.* 369; see *Ante*, Note 32.

73. Malice is a question of fact for the jury. *Porter v. Seale*, 8 *Cal.* 217; *Bulkely v. Smith*, 2 *Duer*, 261; 11 *N.Y. Leg. Obs.* 300.

74. Necessaries.—Necessaries or not necessities may be a mixed question of law and fact. (*Wharton v. McKenzie*, 5 *Q. B.* 606.) But what constitutes necessary furniture is a question of fact for the jury. *Wilson v. Ellis*, 1 *Denio*, 462; *Whitmarsh v. Angle*, 3 *Code Rep.* 53; 3 *Am. Law R. (N.S.)* 595.

75. Necessity (*McCullough v. Moss*, 5 *Denio*, 507) is a question of fact.

76. Negligence.—Where facts are disputed, the question of negligence is for the jury. *Richmond v. Sac. Val. R.R. Co.*, 18 *Cal.* 351; *Oldfield v. N.Y. and Harlem R.R. Co.*, 3 *E. D. Smith*, 103; *Tobin v. Murison*, 5 *Moore's P. C. Cas.* 110; *Bernhardt v. Rensselaer*

R.R. Co., 19 *How. Pr.* 199; 32 *Barb.* 165; affirmed in 23 *How. Pr.* 166; *Buckingham v. Payne*, 36 *Barb.* 81; but see *Purvis v. Coleman*, 1 *Bosw.* 321; *Mangam v. Brooklyn R.R. Co.*, 36 *Barb.* 237; *Foot v. Wiswell*, 14 *Johns.* 304; *Moore v. Westervelt*, 2 *Duer*, 59; 1 *Bosw.* 357; reversed 21 *N.Y.* 103; *Purvis v. Coleman*, 1 *Bosw.* 321; see *Ante*, Note 34.

79. Nuisance.—Whether obstructions amount to a nuisance. (*Gunter v. Geary*, 1 *Cal.* 467; *Blanc v. Klumpke*, 29 *Id.* 156; *City of San Francisco v. Clark*, 1 *Id.* 386; *N.Y. Fire Depart. v. Harrison*, 2 *Hill.* 455; but see 17 *How. Pr.* 273; 9 *Abb. Pr.* 1; 18 *How. Pr.* 181; *Brown v. Mohawk and Hudson R.R. Co.*, *How. App. Cas.* 52, 66; *Poler v. N.Y. Cent. R.R. Co.*, 16 *N.Y.* 476; *Hart v. Baldwin*, 1 *N.Y. Leg. Obs.* 139.) In an action for obstructing access to plaintiff's lot, the question whether the obstruction was carried to an unnecessary or unreasonable degree, or was continued for an unreasonable length of time, are questions of fact. (*St. John v. Mayor of N.Y.*, 6 *Duer*, 315; *Vermilyea v. Austin*, 2 *E. D. Smith*, 203; *Brown v. Mohawk and Hudson Riv. R.R. Co.*, *How. App. Cas.* 52, 66.) But the question of a flagrant nuisance is a mixed question of law and fact. *Hartz v. Long Island R.R. Co.*, 13 *Barb.* 647, 657.

80. Notice.—Whether notice has been served or not; (*Jackson v. Livingston*, 3 *Johns.* 455;) whether a notice referred to the same note, and was so understood by the indorser; (*Reedy v. Leixas*, 2 *Johns. Cas.* 337; *Ontario Bank v. Petrie*, 3 *Wend.* 456; *Bank of Rochester v. Gould*, 9 *Id.* 279;) whether indorser was misled; (*McKnight v. Lewis*, 5 *Barb.* 681; see *Clark v. Dearborn*, 6 *Duer*, 309;) are questions of fact. See *Ante*, Note 36.

81. Partnership.—Whether a partnership existed, what must be the form, name, and whether note was given for partnership transactions, are questions for the jury. (*Drake v. Elwyn*, 1 *Cal.* 184.) So of notice of dissolution of partnership. *Rabe v. Wells*, 3 *Cal.* 151; *Treadwell v. Wells*, 4 *Id.* 260; see *Ante*, Note 38.

82. Payment.—Whether acceptance of a part payment is intended by the creditor to be in full or not; (*Pierce v. Pierce*, 25 *Barb.* 243;) where there is a conflict of evidence, the question whether a note was received in payment; (*Atlantic Fire and Marine Ins. Co. v. Boies*, 6 *Duer*, 583; *Johnson v. Weed*, 9 *Johns.* 310;) whether money forwarded to acceptor by indorsee through drawer was intended as a

payment, so as to discharge acceptor; (*Bean v. Canning*, 2 *E. D. Smith*, 419; 10 *N.Y. Leg. Obs.* 248;) whether a promissory note was intended as payment; (*Myatts v. Bell*, 41 *Ala.* 222;) are questions for the jury.

83. Possession.—What is actual and what is constructive possession in many cases (*O'Callaghan v. Booth*, 6 *Cal.* 65; *Parsons v. Brown*, 15 *Barb.* 593) is for the jury. Cases at law, in which the title or right of possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery, or the defendant for a defense. *Pollock v. Cummings*, *Cal. Sup. Ct., Oct. T.*, 1869.

84. Pre-Emption.—Whether acts have been performed, giving a person the rights of pre-emption (*Megerle v. Ashe*, 33 *Cal.* 74) is a question of fact. See the late cases of *Ketchum v. Dunn* and *Toland v. Mandell*, *Cal. Sup. Ct., Jul. T.*, 1869.

85. Principal and Agent.—Whether the credit was given to the agent or his principal is a question of fact for the jury. (*Hovey v. Pitcher* 13 *Mo.* 191; *Pitcher v. Hovey*, 16 *Id.* 436.) Whether an agent acted within the scope of his authority is a question of fact. (*Taylor v. Labeaume*, 14 *Mo.* 572; *McMorris v. Simpson*, 21 *Wend.* 610.) Where goods were sent by a commission merchant to agents, it is for the jury to decide whether such agents were the agents of the commission merchants or the owner of the goods. (*Pomeroy v. Siger-son*, 22 *Mo.* 177.) The authority of an agent (*Thurman v. Wells*, 18 *Barb.* 500) is a question for the jury.

86. Prior Appropriation.—Priority in the appropriation of water is a question of fact for the jury. *Weaver v. Eureka Lake Co.*, 15 *Cal.* 274.

87. Prior Possession.—The question as to whether a settler on the public land has proceeded with reasonable diligence to follow up his location with the necessary improvements, so as to recover against a subsequent possessor, is a question of fact for the jury. *Staininger v. Andrews*, 4 *Nev.* 59; *Sharon v. Davidson*, *Id.* 416; see *Ante*, Note 84.

88. Private Way.—Whether the change in a private way was by agreement or not, and whether it was to be permanent, are questions of fact. *Hamilton v. White*, 4 *Barb.* 60; affirmed, 5 *N.Y.* 9.

89. Prohibited Sale.—Whether a sale was made in good faith or was an invasion of a prohibited statute (*Baker v. Richardson*, 1 *Cav.* 77; *Suydan v. Morris Canal and Banking Co.*, 6 *Hill*, 217) is a question of fact.

90. Purchaser.—That plaintiff became the owner by purchase is a question of fact. *Prindle v. Caruthers*, 15 *N.F.* 427.

91. Reasonable Search.—Whether or not reasonable search had been made for lost document (*Clarke v. Owens*, 18 *N.F.* 435) is a question of fact.

92. Seasonable Time (*Luckhart v. Ogden*, 30 *Cal.* 547; *Try v. Hill*, 7 *Taunt.* 397; *Doe v. Landham*, 1 *T.R.* 705; *Pitt v. Shew*, 4 *B. and Ald.* 206; *Hacey v. Hurdon*, 3 *B. and C.* 213; *Tenant v. Bell*, 16 *Law. Jour. Rep. M.C.* 31; *Burton v. Griffiths*, 11 *M. & W.* 817; *Sage v. Hazard*, 6 *Barb.* 179; *Conger v. Hudson Riv. R.R.*, 6 *Duer*, 375; *Serle v. Norton*, 2 *M. & Rob.* 401; *Van Trot v. McCulloch*, 2 *Hill*, 272; *Gallagher v. White*, 31 *Barb.* 92; *Greene v. Haines*, 1 *Hill*, 254; *Lawrence v. Ocean Ins. Co.*, 11 *Johns.* 241; see 9 *Abb. Pr.* 116, 124; *Cocker v. Franklin Hemp and Flax Manf. Co.*, 3 *Sumn.* 532; but see *Bell v. Wardell*, 2 *Willes*, 204) is a question of fact.

93. Reasonable Use.—Reasonableness of the use of water is a question for the jury. 6 *Barr.* 32; 2 *Walls.* 332; 15 *Conn.* 263; *Esmond v. Chew*, 15 *Cal.* 143; *Thomas v. Brackney*, 17 *Barb.* 654.

94. Re-Organization, as of a corporation, is a question of fact. *Hyatt v. McMahon*, 25 *Barb.* 458.

95. Reputed Ownership is a question of fact for the jury. *Edwards v. Scott*, 1 *M. and G.* 962; 2 *Sc. N.R.* 266.

96. Sale.—Whether a sale was completed or not, is a question for the jury. (*DeRidder v. McKnight*, 13 *Johns.* 294.) Also, whether a party assented to a sale under execution, where property was sold of which he was joint owner. *Fiero v. Betts*, 21 *Barb.* 633; see *Ante*, Note 47.

97. Seaworthy or Not is a question of fact for the jury. *Sherwood v. Ruggles*, 2 *Saund.* 55; *Patrick v. Hallett*, 1 *Johns.* 241;

Clifford *v.* Hunter, 3 *Car. and P.* 16; Walsh *v.* Wash. Mar. Ins. Co., 32 *N.Y.* 427.

98. Seizure in Fee.—That plaintiff was seized as of fee is a question for the jury. *Vigers v. Dean of St. Pauls*, 14 *Jur.* 1,017.

99. Son.—That a person is the son of another man is a question for the jury. *Semble Reg. v. Inhab. of Aberdaren*, 1 *New. Mag. Cas.* 51.

100. Special Agreement.—Whether there was a special agreement by which the original demand sued on was extinguished by note or receipt in full (*St. Bt. "Charlotte" v. Hammond*, 9 *Mo.* 58) is a question of fact.

101. Trespass.—Where possession is proved, it is for the jury to determine whether acts of the defendant, of which evidence is given, amount to a trespass. (*Perry v. Block*, 1 *Mo.* 484.) The amount of damages in actions of trespass (*Drake v. Palmer*, 4 *Cal.* 11) a question of fact for the jury, *Covett v. Hill*, 2 *Seld.* 381.

102. "Unreasonable and Vexations Delay."—What constitutes such a delay is a question of fact for the jury. *McLean v Thorp*, 4 *Mo.* 256.

103. Usual Covenants.—*Bennett v. Wornack*, 3 *Car. & P.* 96.

104. Widow.—That a woman is the widow of a particular man. *Semble Reg. v. Inhab. of Aberdaren*, 1 *New. Mag. Cas.* 51.

105. Warranty.—The question whether words used by a seller of chattels amounts to a warranty. (*Duffee v. Mason*, 8 *Cow.* 25; *Whitney v. Sutton*, 10 *Wend.* 412; *Cook v. Moseley*, 13 *Id.* 277; *Stryker v. Bergen*, 15 *Id.* 490; *Moses v. Mead*, 3 *N.Y. Leg. Obs.* 69; affirmed, 1 *Den.* 378; 5 *Id.* 617; *Rogers v. Ackerman*, 22 *Barb.* 134; *Blakeman v. Mackay*, 1 *Hill.* 266.) Whether defect in the property sold was greater than that excepted in the vendor's warranty. (*Wade v. Scott*, 7 *Mo.* 509.) Sound or unsound is a question of fact. *Lewis v. Peake*, 7 *Taunt.* 153.

114. Witness.—The credibility of a witness. *Conrad v. Williams*, 6 *Hill*. 444; *Woodin v. People*, 1 *Park. Cr.* 464.

115. Written Instruments.—It is the province of the Court to construe written instruments, but where they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted. (*Primm v. Haren*, 27 *Mo.* 205.) The construction and true interpretation of commercial correspondence may, under proper circumstances, be left to the jury. (*Fagin v. Connolly*, 25 *Mo.* 94.) That indorsements on notes were made as surety. (*Dow v. Platner*, 16 *N.Y.* 567; *Sisson v. Barrett*, 2 *N.Y.* 406; affirming 6 *Barb.* 199.) Or when an undated instrument was made. (*Coons v. Chambers*, 1 *Abb. Pr.* 165.) It is for the jury to determine whether the note tendered in part payment for a horse was the note understood and intended by the parties in their contract. (*Fenton v. Perkins*, 3 *Mo.* 23, 144.) Whether an indorsement on a note has been erased. (*Swan v. O'Fallon*, 7 *Mo.* 231.) Whether an alteration appearing upon the face of an agreement was made before or after its execution. (*Pringle v. Chambers*, 1 *Abb. Pr.* 58; *Maybee v. Sniffen*, 2 *E. D. Smith*, 1; 10 *N.Y. Leg. Obs.* 18; *Smith v. McGowan*, 3 *Barb.* 404; 1 *Code R.* 27.) The question of the identity of a written instrument is for the jury. *Jackson v. Betts*, 6 *Cow.* 377; *Bank of Cape Fear v. Gomez*, *Id.* 435.

QUESTIONS WHICH RAISE A MIXED ISSUE OF LAW AND FACT.

116. Association.—That the company was illegally associated is a mixed question of law and fact. *Ransford v. Copeland*, 6 *Adol. & E.* 482.

117. Defects.—Whether or not defects in articles sold were visible. *Birdseye v. Frost*, 34 *Barb.* 367.

118. Delivery and Change of Possession.—*Vance v. Boynton*, 8 *Cal.* 554.

119. Description of Land.—Description of land in ejectment, if sufficient on the face of the complaint, whether it will apply to the

land sought to be recovered, is a mixed issue of law and fact. *Moss v. Shear*, 30 *Cal.* 467.

120. Due Course of Law is a mixed question of law and fact. *Backus v. Shipherd*, 11 *Wend.* 629; *Penniman v. Hudson*, 14 *Barb.* 579; *Thomas v. Woods*, 4 *Cow.* 173; *Cumpston v. McNair*, 1 *Wend.* 457.

121. Duly is a mixed question of law and fact. *Gillett v. Fairchild*, 4 *Denio*, 83; *Beach v. King*, 17 *Wend.* 17; *White v. Joy*, 3 *Kern.* 86.

122. Duly Convened.—*People v. Walker*, 2 *Abb. Pr.* 422.

123. Insolvency.—The question of the insolvency of the maker of a promissory note, not negotiable under the Statute, in suit against the indorser. *Pococke v. Blount*, 6 *Mo.* 338.

124. New Promise.—Where there is a dispute as to the facts, whether a sufficient promise has been made to take the case out of the Statute. *Clark v. Dutcher*, 9 *Cow.* 674.

CHAPTER II.

TRIAL IN GENERAL.

1. After the complaint and answer are filed in the action, and all demurrers, motions to strike out, to amend the complaint or answer, and all other incidental motions are disposed of, the cause is at issue, and ready for trial. All actions are tried in one of three ways: *First*, If it be an action at law, and a jury is not waived, it will be tried by a jury. *Second*, All equity actions are tried by the Court. *Third*, Trial by referee, which is generally done by consent of counsel, and order of reference being made in pursuance of such consent.

2. It is not within the scope of this work to go beyond the plain letter of the law relative to any matter of pleading or of practice. Yet the question of properly and safely trying causes is one of much importance. Experience has taught the profession that there are really but two avenues open for success at the bar, relative to the practice of the law; the one is to get *correctly into court*, the other is to get *safely out of court*. In other words, one is to draw the pleadings correctly, and the other to properly present the facts of the case, and preserve all the legal rights of the party represented in the course of the trial.

3. In either branch, the evidence of success is the *result*. By result is meant the *final result*; for it is one

thing to win a cause, and quite another thing to win it and yet keep the record free from error, so that on appeal the judgment below will not be reversed. *Remote* as well as *immediate* consequences must be guarded against. He who tries his cause with the sole idea of gratifying the prejudices of listening friends, or of tickling the ears of unlearned jurors, often in the end loses what a more careful and less ornate display might have secured to his client.

DUTIES OF CLERK.

4. The clerk shall enter all causes on the calendar of the court according to the date of issue. Causes once placed on the calendar for a general or special term, if not tried or heard at such term, shall remain upon the calendar from court to court, until finally disposed of. (*Cal. Pr. Act*, § 156.) Counsel have a right to rely on the presumption that the causes upon the calendar will be heard in their regular order, and to act upon that belief in calculating how long they will have for preparation. (*Belmont v. Erie R.R. Co.*, 52 *Barb.* 637.) The Clerk shall keep among the records of the court a register of actions. He shall enter therein the title of the action, with brief notes under it, from time to time, of all papers filed, and proceedings had therein. *Cal. Pr. Act*, § 528.

5. When a jury is waived, and the whole case is tried before the Court, the record should show whether the trial was confined to the equitable defenses alone, or included all the defenses in the cause. It should distinctly appear that the equitable defenses were first tried and disposed of, or that all the issues were submitted

and tried together. In the natural order, it was the duty of the Court first to try, and decide upon the equitable defense, before proceeding with the action at law. So held in an action where the judgment enjoined the plaintiff from setting up a particular title, without finally deciding the title or right of possession of the parties to the land in controversy. *Martin v. Zellerbach, Cal. Sup. Ct., 7ul. T., 1869.*

CONTINUANCE.

6. The cause having come on for trial, one of the parties, not being ready for such trial, can move the Court, upon affidavit, for a continuance, on any one of the following grounds: *First*, Absence of witnesses or witness. *Second*, For any other reason which would, if the case were forced to trial, be subversive of the ends of justice—*e.g.*, sickness of counsel, or of the parties, or a party to the action, etc. etc.

7. The granting or refusing a continuance is in the sound discretion of the Court, and not subject to review, except in cases of gross abuse of that discretion. Consult the following authorities on the subject: (*Wilson v. McDonald, Cal. Sup. Ct., 7ul. T., 1869*; *Frank v. Brady, 8 Cal. 47*; *Musgrove v. Perkins, 9 Id. 211*; *Pilot Rock Creek Canal Co. v. Chapman, 11 Id. 161*; *People v. Gaunt, 23 Id. 156*; *Griffin v. Polhemus, 20 Id. 180*; *Hastings v. Hastings, 31 Id. 95*; *Harper v. Lamping, 33 Id. 641*; *Carey v. P. and C. Petroleum Co., Id. 694*; *Freleigh v. The State, 8 Mo. 606*; *Scogin v. Hudspeth, 3 Id. 123*; *Chambers v. Lane, 5 Id. 289*; *Beatty v. Sylvester, 3 Nev. 228*; *Choat v. Bullion Min. Co., 1 Id. 73*; *Ogden v. Payne, 5 Cow. 15*; *Reynard v.*

Bicknell, 4 *Pick.* 301; Barker *v.* Haskell, 9 *Cush.* 218; Leggett *v.* Boyd, 3 *Wend.* 375; Congar *v.* Galena R.R. Co., 17 *Wis.* 477; Berger *v.* Harrison, 1 *Overt.* 485; Evans *v.* Bolling, 5 *Ala.* 550; Planters' and Merchants' Bank *v.* Walker, 7 *Ala.* 926; Dulany *v.* Boston, 2 *Har-ring.* 350; Campbell *v.* Strong, *Hempst.* 265; McCracken *v.* Church, 1 *A. K. Marsh.* 273.) They are extremely liberal in granting adjournments. (Turner *v.* Morrison, 11 *Cal.* 21.) It is error to refuse a continuance when a good cause is shown. (Moore *v.* McCulloch, 6 *Mo.* 444; Tunstall *v.* Hamilton, 8 *Id.* 500.) A continuance relating back may be entered at any time to effect the purposes of justice. Sheppard *v.* Wilson, 6 *How. U.S.* 260.

No. 1017.

Affidavit for Continuance.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above entitled action.

II. That he cannot safely go to trial at this term of of this Court, on account of the absence of and, who are material witnesses for defendant.

III. That subpoenas in said cause were duly issued by the Clerk of this Court, and by this defendant placed in the hands of, the Sheriff of said County, on the day of, 18.., for service on the said and

IV. That on the day of, 18.., said

subpœnas were personally served on the said and, in said County.

V. That said subpœnas required the said witnesses to be present in court at the hour of o'clock A.M. of this the day of, 18.., to testify on behalf of defendant.

VI. That the evidence of each of said witnesses is material for defendant's defense.

VII. That he will prove by said witnesses [*here state the evidence each will give, naming him*].

VIII. That said facts which defendant can prove by said witnesses cannot, to his knowledge, be proven by any other persons.

IX. This affidavit is not made for delay merely, but that justice may be done in the premises; and affiant verily believes that if this cause be continued for this term of this Court, he will be able to have the said witnesses present at the next term thereof.

[*Jurat.*]

[SIGNATURE.]

NOTE.—No notice of an application for continuance is generally given; the application is usually made when the cause comes on for trial; sometimes, however, the application is made before the day of trial, so that no preparation for trial need be made.

8. Affidavit must State.—*First*, That the evidence designed to be obtained is material. (Hawley v. Stirling, 2 Cal. 470; Berry v. Metzler, 7 Id. 418; Harper v. Lamping, 33 Cal. 641; Ward v. Mooney, Wash. Terr. 123; Ballston Spa Bank v. Marine Bank, 16 Mo. 120; Bruton v. State, 21 Tex. 337; McDonald v. Smith, 21 Ark. 460; Fake v. Edgerton, 6 Duer, 653.) *Second*, That the evidence designed to be obtained is not cumulative. (People v. Quincy, 8 Cal. 89; Pierce v. Payne, 14 Id. 419; People v. Gaunt, 23 Id. 156; Pope v. Dalton, 31 Id. 218.) *Third*, That affiant cannot prove the same matters by

other witnesses. (*Harrell v. Durrance*, 9 *Flor.* 490.) Or, that he cannot safely proceed to trial without his evidence. (*Harrell v. Durrance*, 9 *Flor.* 490.) *Fourth*, The affidavit should show that there is a *reasonable prospect* of obtaining the testimony at some future time (*Richardson v. People*, 31 *Ill.* 170.) An affidavit which states that the applicant knows of witnesses in the State by whom the material facts can be proved is insufficient. (*Thompson v. Lord*, 14 *Iowa* (6 *With.*) 591.) *Fifth*, That due diligence has been used to procure the witness; (*Cal. Pr. Act*, § 158; *People v. Baker*, 1 *Cal.* 404; *Pierson v. Holbrook*, 2 *Cal.* 598; *Kuhland v. Sedgwick*, 17 *Id.* 123; *People v. Williams*, 24 *Id.* 31; *McLane v. Harris*, 1 *Mo.* 700; *Darne v. Broadwater*, 9 *Mo.* 18; *Roeder v. Brown*, *Wash. T.* 132; *Kelly v. Saunders*, 35 *Mo.* 200; *Niles v. Danforth*, 32 *Ill.* 59; *Fonshee v. Lee*, 4 *Cal.* 279; *Moore v. McCullough*, 6 *Mis.* 444; *Mugg v. Graves*, 22 *Ind.* 236;) and the character of that diligence. (*People v. Thompson*, 4 *Cal.* 240; *People v. Quincy*, 8 *Id.* 89; *Pierce v. Payne*, 14 *Id.* 420.) *Sixth*, And he must name the place of residence of said absent witness. (*Harper v. Lamping*, 33 *Cal.* 641; *Richardson v. People*, 31 *Ill.* 170; *Webb v. State*, 21 *Ind.* 236.) And the Court may also require the moving party to state on affidavit the evidence which he expects to obtain. (*Cal. Pr. Act*, § 158; *Bruton v. State*, 21 *Tex.* 337; *Winslow v. Bradley*, 15 *Wis.* 394.) *Seventh*, That application is not made for delay merely. (*People v. Thompson*, 4 *Cal.* 238; *People v. Quincy*, 8 *Id.* 89; *Pierce v. Payne*, 14 *Id.* 420.) *Eighth*, That a party has a good and substantial cause of action or defense on the merits. (*Rules of Court, San Fran. Co.* xli.; *Balston Spa Bank v. Marine Bank*, 16 *Wis.* 120.) Where an affidavit for a continuance is filed, the Court should not permit it to be strengthened by other affidavits of the same person. *The State v. Buckner*, 25 *Mo.* 167.

9. Continuance Refused.—A continuance will not be granted solely to allow a party to obtain evidence on a point rendered immaterial by his own answer. (*Ballston Spa Bank v. Marine Bank*, 16 *Wis.* 120.) Continuance will not be granted to the prejudice of the opposite party, when the applicant has been guilty of negligence. (*Dulany v. Boston*, 2 *Harring.* 350.) A party who takes no steps to obtain the deposition of a witness whom he knows to be a seafaring man, is not entitled to a continuance for absence of such witness. (*Deanes v. Scriba*, 2 *Call.* 415.) So, where a party neglects to subpoena a witness, relying on his promise to attend. *Freeland v. Howell*, *Anth. N. P.* 272.

10. Costs.—In general, taxable costs are the only terms, payment of which should be imposed as a condition of putting off a trial. (*Hall v. Dwinell*, 10 *Wend.* 628; *Patton v. Blackwell*, 2 *Tenn.* 114.) And only costs incurred with reference to the particular circuit. (*Morrell v. Gould*, 5 *Hill*, 553.) And when, after postponement on defendant's application, the cause went over again because of Judge's illness, he was not properly chargeable with costs of the circuit. (2 *Wend.* 286; *Bagley v. Ostrom*, 5 *Hill*, 516.) So, where the cause goes off at the circuit because plaintiff is not ready. *Jackson v. Breese*, 6 *Cow.* 42.

11. Election Cases.—The County Judge, at chambers, has no power to grant a continuance in an election contest where trial was set at a future day. *Norwood v. Kenfield*, 34 *Cal.* 329.

12. Grounds for Continuance.—The absence of evidence is a ground for continuance. (*Cal. Pr. Act*, § 158.) The same in actions of an equitable as in those of a legal character. (*Howard v. Freeman*, 3 *Abb. Pr. (N.S.)* 292.) But a continuance for absence of witness will not be granted where only two days have intervened between issuance of subpoena and application for continuance. (*Parker v. Campbell*, 21 *Tex.* 763.) Newly discovered evidence is also a ground for continuance. (*Barry v. Metzler*, 7 *Cal.* 418; *Allcorn v. Rafferty*, 4 *J. J. Marsh.* 220.) So, surprise is a ground for continuance. (*Ross v. Austill*, 2 *Cal.* 183; *Polk v. Coffin*, 9 *Id.* 58; *People v. Holden*, 28 *Cal.* 124; *Shellhouse v. Ball*, 29 *Cal.* 608; cited in *Doyle v. Sturlia*, *Cal. Sup. Ct., Jul. T.*, 1869.) As by withdrawal of demurrer, and a replication filed in its stead. (*Risher v. Thomas*, 1 *Mo.* 739.) Or where a pleading is amended in a matter of substance. (*Tunstall v. Hamilton*, 8 *Mo.* 500; *Tourtlot v. Tourtelot*, 4 *Mass.* 506.) So, on re-apportionment of causes. (*Elliott v. Cadwallader*, 14 *Iowa*, 67.) So, also, the want of preparation for trial is a ground for continuance. (*Turner v. Morrison*, 11 *Cal.* 21.) The withdrawal of a juror is a ground for continuance. (*Benedict v. Cozzens*, 4 *Cal.* 381; *Scofield v. Settle*, 31 *Ill.* 515.) Motion for continuance for surprise must be supported by affidavit. (*People v. Symonds*, 22 *Cal.* 348.) The attendance of a member of the Legislature on its session may be a ground for a continuance of a cause in which he is a defendant. (*Johnson v. Offatt*, 4 *Met. (Ky.)* 19.) But it has been held in California that the voluntary absence of a defendant on important business is no ground for a continuance. (*Wilkinson v. Parrott*, 32 *Cal.* 102.) A cause may be continued after a hearing, for further proof. (*Washburne v. Holmes*, *Wright*, 67.)

In Vermont, where all the parties in interest are not before the Court, the case may be continued to bring them there. (*Beardsley v. Knight*, 10 *Verm.* 185.) A party who is unprepared for trial at the time of calling the case should move for a continuance. *Turner v. Morrison*, 11 *Cal.* 21.

13. Insufficient Grounds.—Voluntary absence of defendant on important business is no ground for continuance. (*Wilkinson v. Parrott*, 32 *Cal.* 102.) Nor is a mistaken advice of counsel to his client not to prepare for trial. (*Musgrove v. Perkins*, 9 *Cal.* 211.) Voluntary absence of attorney no cause for continuance. (*Haight v. Green*, 19 *Cal.* 113; *Adams v. Adams*, 1 *Duval (Ky.)* 167.) When, through the inadvertence of a party, he is unable to produce evidence which is in his own possession, no continuance will be granted. (*Kuhland v. Sedgwick*, 17 *Cal.* 123.) The absence of a transient witness, whom the party had an opportunity of examining before the trial, is no cause for putting off the trial. (*McNay v. Marine Ins. Co.*, 2 *Cal.* 384.) It is no ground for a continuance that a material witness for the applicant is in another county in this State, where the applicant has taken no steps to procure his deposition, because he saw the witness, several weeks before, and the witness promised to be present at the trial. (*Lightner v. Manzell*, 35 *Cal.* 552.) Nor that the applicant was informed by his attorneys, several weeks before the term, that the case could not be tried at that term, and that such attorneys reside at a great distance and are not present, and their attendance cannot be procured. *Lightner v. Menzell*, 35 *Cal.* 552.

14. Insufficient Statement.—In application for continuance, the allegation that a party has used all the diligence in his power is not sufficient. It should be shown to the Court of what such diligence consisted; whether by exhausting the process of the Court, or otherwise. (*People v. Thompson*, 4 *Cal.* 241.) For the same reason, if a party states, on information and belief, that he can procure the personal attendance of a witness from a distant foreign country, he should set forth the reasons for the belief, and the nature of his information, that the Court may decide whether or not there is reasonable ground to believe that the witness will attend. (*People v. Francis*, *Cal. Sup. Ct., Jul. T.*, 1869.) Inconvenience to prepare for hearing is not a good ground for postponement of the argument. *Bank of Salina v. Alvord*, 32 *N.F.* 684.

15. Stipulation.—A continuance may be granted on consent of

parties, reduced to written stipulations therefor; but an agreement of counsel for the continuance of a cause, not reduced to writing, will not be regarded by the Court. (*Peralta v. Mariea*, 3 *Cal.* 187.) A defendant dangerously ill may be required, as a condition of postponing the trial, to stipulate that his death before the next circuit shall not abate the cause. *Ames v. Webbers*, 10 *Wend.* 575.

16. Preventing a Continuance.—If the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed. (*Cal. Pr. Act*, § 158; *Blankman v. Vallejo*, 15 *Cal.* 645; *Boggs v. Merced Min. Co.* 14 *Id.* 358; *O'Neil v. N.Y. and Silver Peak Min. Co.*, 3 *Nev.* 141.) The affidavit thereupon becomes evidence, but not conclusive proof of its contents. (*Id.*) The admission of counter affidavits, on a motion for a continuance, is in the sound discretion of the Court. (*Riggs v. Fenton*, 3 *Mo.* 28; *Anonymous*, 3 *Day*, 308.) That they cannot be read, see (*Manning v. Jameson*, 1 *Cranch C. Ct.* 285.) Where a continuance was granted for seven days, against the objections of respondent, and without affidavits: *Held*, that it operated a discontinuance of the proceeding. *Keller v. Chapman*, 34 *Cal.* 635.

17. Waiver of Rights.—Where the plaintiff to an action, with full knowledge of his right to proceed to trial only at his own option against the defendants served, and of the fact that no service had been made upon one of the defendants, who had left the State, and that no issue had been joined as to him, first agreed with the defendants served, without reservation, that the issue between him and them should be set for trial at a particular day, then asked and obtained a continuance for the reason solely that his witnesses were not present, and in consideration of such continuance, by consent, agreed of record that the case should be set for trial and be tried on a particular day: *Held*, that this state of facts clearly constituted a waiver by plaintiff of his right to delay the trial until said other defendant had been served or issue joined in respect to him. *Meagher v. Gagliardo*, 35 *Cal.* 602.

CHAPTER III.

TRIAL BY THE COURT.

1. Issue being joined, and no continuance being granted, either party may bring the issue to trial, or to a hearing, and in the absence of the adverse party, unless the Court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require. *Cal. Pr. Act*, § 157.

2. The parties may waive a trial by jury, and submit the issue upon the pleadings to trial by the Court, but it cannot be waived by implication. (*Smith v. Pollock*, 2 *Cal.* 92; *Russell v. Elliot*, *Id.* 245; *Exline v. Smith*, 5 *Id.* 112.) The circumstance that a defendant excepts to a finding of facts and conclusions of law by a jury does not amount to a waiver of a trial by jury. *N.Y. and H. R.R. Co. v. Schuyler*, 34 *N.Y.* 30.

3. The right of trial by jury may be waived in the mode prescribed by law. (*Cal. Pr. Act*, § 179, Subd. 1.) *First*, By failing to appear at the trial, which operates as a consent that issue be tried by the Court. So, in replevin, when the action is called; (*Waltham v. Carson*, 10 *Cal.* 178;) affirmed in ejectment in (*Doll v. Feller*, 16 *Id.* 433;) and, generally, (*Gillespie v. Benson*, 18 *Id.* 409;) even though an answer be filed. (*Zaine v. Crowe*, 4 *Cal.* 112.) *Second*, By written consent, in person, or by attorney, filed with the Clerk.

Third, By oral consent, in open court, entered on the minutes. *Fourth*, By such rule as the Court may prescribe. (*Cal. Pr. Act*, § 179; *N.Y. Code*, § 266; *Laws of Oregon*, § 215; *Idaho*, § 179; *Arizona*, § 181; *Wash. T.* § 220; 2 *Whitt. Pr.* 220; 2 *Till. & Shear. Pr.* 428; *Smith v. Pollock*, 2 *Cal.* 92; *Russell v. Elliot*, 2 *Cal.* 245; *Exline v. Smith*, 5 *Id.* 112; *Fire Department v. Harrison*, 2 *Hill*, 455; *Lewis v. Varnum*, 12 *Abb. Pr.* 305.) Or by failure to file with the Clerk, at least six days before the commencement of the term, a notice that a jury will be required. (*Doll v. Anderson*, 27 *Cal.* 248.) Though the Court has a right in such case to submit the issue of fact to a jury. (*Id.*) In New York, a jury trial may be waived by entering on the trial of an action by the Court without objection, or objecting by way of motion to dismiss the complaint only. *Barlow v. Scott*, 24 *N.Y.* 40; *Greason v. Keteltas*, 17 *N.Y.* 498; affirming *Newcombe v. Keteltas*, 19 *Barb.* 608; *Moffatt v. Moffatt*, 17 *Abb. Pr.* 4; 10 *Bosw.* 468.

4. The trial by jury does not necessarily attach in equity cases. (*Smith v. Rowe*, 4 *Cal.* 7.) Equitable cases are properly triable by the Court, and the trial of issues of facts by a jury cannot be claimed as of right, but rests in the discretion of the Court. (*Moffatt v. Moffatt*, 10 *Bosw.* 468; 17 *Abb. Pr.* 4; *McCarty v. Edwards*, 24 *How. Pr.* 236.) And in chancery cases parties are not entitled to a trial by jury. *Walker v. Sedgwick*, 5 *Cal.* 192; *Cahoon v. Levy*, *Id.* 294; *Koppikus v. State Capitol Commissioners*, 16 *Id.* 248.

5. In all cases at law, the right of trial by the Court can be insisted on and enforced. (*Cahoon v. Levy*, 5

Cal. 294; *Grimm v. Norris*, 19 *Id.* 140; *Koppikus v. State Capitol Commissioners*, 16 *Id.* 248.) In such cases, the right of trial by the Court is as a general rule absolute; (*Wilson v. Forsyth*, 16 *How. Pr.* 448; *Draper v. Day*, 11 *How. Pr.* 439; *O'Brien v. Bowes*, 4 *Bosw.* 657; 10 *Abb. Pr.* 106; *Church v. Freeman*, 16 *How. Pr.* 294;) and the Court may in such cases disregard the verdict of the jury. (*Goode v. Smith*, 13 *Cal.* 84.) Nor is the right affected by a supplemental pleading. (*Currie v. Cowles*, 9 *Bosw.* 642.) Nor by amendment after issue joined. *McCarty v. Edwards*, 24 *How. Pr.* 236.

6. A cause may be submitted to the jury, no objection being made at the time, after it has been submitted to the Court without a jury. (*McAllister v. Mullanphy*, 3 *Mo.* 38.) But not after the hearing. (*O'Brien v. Bowes*, 4 *Bosw.* 663.) In Missouri, proceedings against a constable for delinquency must be heard by the Court. (*Hart v. Robinett*, 5 *Mo.* 11; *Hart v. Spence*, *Id.* 17.) In a case for specific performance and damages, where specific performance cannot be adjudged, the case may be retained and sent to a jury to award damages. (*Lewis v. Varnum*, 12 *Abb. Pr.* 305; *Barlow v. Scott*, 24 *N.Y.* 40; *Stevens v. Buxton*, 37 *Barb.* 13; 15 *Abb. Pr.* 352; see, also, *See v. Partridge*, 2 *Duer*, 463.) And so, in a case to reform a policy and recover for a loss. *N.Y. Ice Co. v. N. West. Ins. Co.*, 23 *N.Y.* 357; 12 *Abb. Pr.* 414; 21 *How. Pr.* 296; reversing 10 *Abb. Pr.* 34; 13 *How. Pr.* 240; and overruling *Van Beck v. Village of Rondout*, 15 *Abb. Pr.* 48.

7. Both legal and equitable relief may be sought in the same action, but when plaintiffs move a trial at a

special term, and defendants demand a jury trial, the Court should direct the cause to be tried by the jury. (*Dairs v. Morns*, 36 *N.Y.* 569.) So, relief was refused and complaint dismissed where plaintiff elected to sue as in equity, and then, on failure at trial, wished the case retained and tried as at law. (*Craig v. Hyde*, 24 *How. Pr.* 313.) On mixed issues involving a demand for equitable relief or damages, the case retained and sent to a jury after failure to establish former demand, on trial by the Court. (*Genet v. Howland*, 45 *Barb.* 560; 30 *How. Pr.* 360; *Stevenson v. Buxton*, 15 *Abb. Pr.* 352.) In California, since the adoption of the constitutional amendments of 1862, district courts have no jurisdiction to try issues framed in probate courts, and Sections twenty and two hundred and twenty-four of the Probate Act have become inoperative. (*Estate of Paulinson*, 35 *Cal.* 509.) So held in the probate of a will. *Id.*

FINDINGS BY THE COURT.

8. Upon the trial of an issue of fact by the Court, its decision shall be given in writing, and filed with the Clerk, within ten days after the trial took place. (*Laws of Oregon*, § 215; *Idaho*, § 180; *Arizona*, § 182; *Wash. Terr.* § 221; *McKeon v. McDermott*, 22 *Cal.* 667.) The above section is directory as to the time required for the written decision to be filed. (*Vermule v. Shaw*, 4 *Cal.* 216; *Burger v. Baker*, 4 *Abb. Pr.* 11; *People v. Dodge*, 5 *How. Pr.* 47; *Stewart v. Slater*, 6 *Abb. Pr.* 84; *Lewis v. Jones*, 13 *Abb. Pr.* 427; *O'Brien v. Bowes*, 4 *Bosw.* 663.) This section is applicable to cases both at law and in equity, the rule laid down in (*Walker v. Sedgwick*, 5 *Cal.* 192) being changed by

statute. *Stat. of Cal.* 1861; *Lyons v. Lyons*, 18 *Cal.* 447; see, also, *Duff v. Fisher*, 15 *Id.* 375; *Stewart v. Slater*, 6 *Duer*, 83, 102; *Burger v. Baker*, 4 *Abb. Pr.* 11; *People v. Dodge*, 5 *How. Pr.* 47.

9. If the Judge should discover a clerical mistake in his findings, or that he had inadvertently committed an error, and should correct it at the same term, before the entry of judgment, while the proceeding is still *in fieri*, and in such a manner as not to deprive the party of opportunity to move for a new trial, or abridge the time for motion for new trial, or cause him to lose any other right thereby, a new trial should not be granted on that ground. (*Prince v. Lynch*, *Cal. Sup. Ct., Jul. T.*, 1869.) The judge who tried the case without a jury did not file his findings of the facts until after the judgment was entered: *Held*, not to be error. (*Vermule v. Shaw*, 4 *Cal.* 214; cited in *Keller v. Sutrick*, 22 *Id.* 473.) But a judge cannot change his findings of facts in a material particular after the entry of judgment on the findings and the adjournment of the term; (*Carpentier v. Gardner*, 29 *Cal.* 160;) but otherwise where a mistake occurs in entry on the record. (*Spanagel v. Dellinger*, 34 *Cal.* 476.) *Query*, Can the Court, on the argument of a motion for a new trial, amend its findings filed when judgment was rendered? *Kimball v. Lohmas*, 31 *Cal.* 154.

10. The findings of a court, like the verdict of a jury, is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the Clerk. (*Reynolds v. Harris*, 8 *Cal.* 617.) It follows, that they need not be embodied in a statement or bill of exceptions. *Id.*

*No. 1018.**Findings in Action for Divorce.*

[TITLE.]

It appearing to the satisfaction of the Court that this action was duly commenced by the filing of the complaint and the issuance of summons thereon, on the day of, 18.., and that the defendant, C. D., had, on the day of, 18.., duly appeared in the above entitled action, and that on the said last mentioned day he filed his answer to said complaint, together with his cross-complaint, by his attorney, and by consent of parties in open court the said cause was, on the day of, 18.., referred to, the Court Commissioner of this Court, to take and report in writing to this Court the testimony which might be offered therein by either party thereto.

And that afterwards, on the day of, 18.., said, as such referee, made his report of said evidence to be filed herein.

Whereupon, on said last mentioned day, the said cause was duly submitted to the Court for decision upon the complaint of the plaintiff and the answer and cross-complaint of the defendant herein filed, and the evidence so reported by said referee, from which the Court finds as facts proven in the case:

1. That plaintiff and defendant were married one with the other at Washoe County, Territory of Nevada, on the day of, 18.., and cohabited together as husband and wife from thence until the day of, 18..

2. That both the plaintiff and defendant are *bona fide* residents of the State of, and have so resided in this State for more than six months continuously next before the commencement of this action and the filing of the complaint herein; and that at the time of the commencement of this action the said plaintiff was a *bona fide* resident of the City and County of

3. That the plaintiff and defendant have two children, issue of said marriage, viz.: T. U., aged years, and V. W., aged years.

4. That between the day of, 18 . . , and the day of, 18 . . , at a lodging house on Street, in the City of, the plaintiff A. B. committed adultery with one, and lived during said time in adulterous intercourse with him. That on the day of, 18 . . , or thereabouts, the plaintiff A. B. lived in a house of prostitution on Street, in said City and County of, said house being kept by one, and that the said plaintiff again committed adultery with divers persons at divers times. That at divers other times between the said day of, 18 . . , and the day of, 18 . . , and at the following houses of prostitution in the City and County of, to wit: at a certain house of prostitution at No., Street, and at a certain other house of prostitution at No., Street, and at a certain other house of prostitution known as the "Abbey House," near, and at a certain other house of prostitution kept by one, on Street, and at a certain other house of prostitution kept by one, on Street, and at a certain other

house of prostitution kept by one, and at a certain other house of prostitution known as "," on Street, the plaintiff A. B. repeatedly committed adultery, with divers persons, and earned a livelihood by habits of prostitution.

5. That plaintiff and defendant have not cohabited with each other since the day of, 18. . . That each and every act of adultery was committed without the consent, connivance, privity or procurement of the defendant, and that the defendant has not cohabited with the plaintiff since his discovery of said adultery. That the plaintiff is and has been for a long time past an abandoned woman, addicted to the use of intoxicating drinks, and that she is a person by character, disposition, conduct, temper and passions wholly unfit to have the care, custody or management of children.

As conclusions of law from the foregoing facts, the Court finds:

1. That the defendant is entitled to a decree of this Court dissolving the bonds of matrimony heretofore existing between plaintiff and defendant, decreeing the plaintiff and defendant each to be freed and absolutely released from the law bonds of matrimony and all the obligations thereof.

2. That the defendant C. D., is entitled to be awarded the sole charge, control and custody of the children, issue of said marriage.

L. M.,

District Judge.

[DATE.]

No. 1019.

Findings in Action to Quiet Title.

[TITLE.]

This cause having been called regularly for trial before the Court (a jury trial having been expressly waived by stipulation in writing of the respective parties appearing therein) [*or as the case may be*], E. F., appeared as attorney for the plaintiff, and G. H. appeared as attorney for defendant. And the Court having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, now finds therefrom the following facts:

I. That this cause was commenced in this Court by the filing of the complaint, and the issuing of a summons thereon, on the day of, 18...

II. That thereafter, to wit: [*date*], said summons was served upon the defendant C. D. personally, in this City and County, by the Sheriff of said City and County, as appears by his return on file.

III. That thereafter, to wit, on the day of, 18..., it having been proved to the satisfaction of the Judge of this Court, by the affidavit of the plaintiff in this suit, now on file herein, that after due diligence and inquiry made by plaintiff, the defendant could not be found in this State; and it further appearing, from said affidavit of said plaintiff, and from the complaint herein verified by the plaintiff, and taken as further affidavit, that said plaintiff has a good cause of action in this suit against each and all of said defendants, it was thereupon ordered by the Court that the said summons

should be served upon the said defendants, by publication thereof in the Daily, a newspaper published in said City and County, once a week, for three months. And that, pursuant to the aforesaid order, the said summons was published in said newspaper at least once a week, consecutively, and continuously, from the day of, 18. . ., the proof of said publication by said summons being made by the affidavit of, a competent witness, now on file herein, said, being the principal clerk of the printers of said newspaper during the period of said publication, and having charge thereof.

IV. That the plaintiff entered into actual possession of all the lots, land, and premises described in the complaint, on or about the day of, in the year of our Lord one thousand eight hundred and, claiming it in his own right; and the said plaintiff has, ever since the date last aforesaid, occupied, used, and cultivated said land, having and keeping within a substantial enclosure, using and claiming the same, in his own right, from that date to the present time, adversely to all the world, and especially as against the defendants.

V. That neither one of all the defendants mentioned in the complaint has been in the possession of any part of the demanded premises since the day of, 18. . .; and that the plaintiff first entered upon said premises justly and lawfully, and not as a trespasser as against the rights of any or either of said defendants, or of those under or through whom they claim.

VI. That the whole of the land described in the complaint lies within the City and County of San

Francisco, and within the limits of what is usually and properly known as and called the Van Ness Ordinance.

VII. That all the issues of fact raised by the pleadings in this cause are hereby found and decided in favor of plaintiff, and against the defendants, and each and all of them.

As conclusions of law from the foregoing facts, the Court now hereby finds and decides:

I. That the plaintiff is the owner in fee simple, and entitled to the possession of all the lots, tracts, and parcels of land, as the same are described in his complaint on file herein, as against the defendants all and severally, and all persons claiming or to claim the same, or any part of said land, under them, the said defendants, or either of them, and that neither one of said defendants has any right, title, or interest in or to said land, or any part thereof.

II. That the plaintiff is entitled to a decree, as prayed for in his complaint, to quiet his title to said land, against said defendants, and each of them, and all persons claiming or to claim the same, or any part thereof, under or through the said defendants, or either of them.

III. That the plaintiff is entitled to a judgment for costs, to be taxed herein against only the defendants who have answered herein contesting plaintiff's rights in said premises; and as to the other defendants who have not answered, or who have answered disclaiming, costs are not to be taxed.

And judgment is hereby ordered to be entered accordingly.

[SIGNATURE.]

[DATE.]

11. Contract.—In an action on contract, the question of waiver being within the issue, and the facts being all before the referee: *Held*, that his finding on the question should be sustained, although the question was not distinctly raised by the pleadings. (*Van Buskirk v. Stow*, 42 *Barb.* 9.) In an action to recover judgment against a municipal corporation, for work done on contracts, and warrants issued therefor, if the Court finds that the warrants issued were issued after the accounts under the contract were audited, and were issued in consideration thereof, it is a sufficient finding that the warrants were drawn for the amount due on the contracts. (*Argenti v. San Francisco*, 30 *Cal.* 458.) Where the defendant's liability depends entirely upon the fact of his indebtedness to a third party, the fact of his indebtedness is the only fact to be found. *Smith v. Coe*, 29 *N.Y.* 666.

12. Conversion.—The legal effect of findings for the defendant, on the question of the plaintiff's right to the property, was to entitle the defendants from whom the property was taken to its restoration. (*Waldman v. Broder*, 10 *Cal.* 378.) A finding that hay, alleged to have been converted, was worth twenty dollars a ton, without finding the number of tons converted, does not entitle plaintiff to a judgment. *Troy v. Clarke*, 30 *Cal.* 419.

13. Ejectment.—In ejectment, it is the better practice for the Court to find upon the facts upon which each party relies on the ground of title. (*Merrill v. Chapman*, 34 *Cal.* 251.) If the Court does not find any of the facts respecting defendant's claim of title, the presumption is that defendant had no title. (*Id.*) If the Court, in ejectment, finds that the defendant has no right or title to the premises, or to the possession thereof, and plaintiff is a tenant in common in the premises with the estate of a deceased co-tenant, and the parties stipulated during the trial, as a substitute for evidence on this point, that the defendant entered under a deed from the administrator of the deceased co-tenant, and by his permission, the finding is contrary to the evidence. (*Carpentier v. Small*, 35 *Cal.* 346.) When title is found in one party, the Court is not *required* to find the facts constituting the other party's *claim* of title, but, if requested, the better practice would be to make such finding. (*Burke v. Table Mt. Wat. Co.*, 12 *Cal.* 483; *Meador v. Parsons*, 19 *Cal.* 294; *Merrill v. Chapman*, 34 *Id.* 251.) Where the Court finds simply that the defendant was in possession at the date of the action, and that he wrongfully withheld the possession of the same from the plaintiff, it must be presumed at least in favor of the judgment that this holding was

in subordination to the legal title. (*Sharp v. Daugney*, 33 *Cal.* 505; *Chouquette v. Barada*, 23 *Mo.* 331.) The findings should state explicitly whether defendant was affected with notice of the fraud of those through whom he claimed title, where notice of such fraud is material. (*Chouteau v. Nuckolls*, 20 *Mo.* 442.) Where a party is in possession of an enclosed portion of a tract, claiming the whole under a deed, it is error in the Court to find a constructive possession to the land outside of the enclosure where the grantor in the deed had not actual possession of the whole. (*Walsh v. Hill*, *Cal. Sup. Ct., Oct. T.*, 1869.)

14. Facts, how Found.—Facts may be found from the pleadings. (*McEwen v. Johnson*, 7 *Cal.* 258; *Breeze v. Doyle*, 19 *Id.* 101; *Rice v. Inskip*, 34 *Cal.* 225.) And must be those in issue. (*Allison v. Darton*, 24 *Mo.* 343; *Farrar v. Lyon*, 19 *Id.* 122; *Burger v. Baker*, 4 *Abb. Pr.* 11.) And must cover all the issues. (*Downing v. Bourlier*, 21 *Mo.* 149; *Russell v. Barcroft*, 1 *Id.* 514; *Attorney-General v. Mayor of N.Y.*, 12 *N.Y. Leg. Obs.* 17; *Chamberlain v. Dempsey*, 14 *Abb. Pr.* 241; *Griffin v. Cranston*, 5 *Bosw.* 658; *Burger v. Baker*, 4 *Abb. Pr.* 11.) And be absolute. (*Malloy v. Wood*, 3 *Abb. Pr.* 369; 14 *How. Pr.* 67.)

15. Facts Left to Inference.—To justify the Supreme Court in inferring a material fact not expressed in the findings, from others which are expressly found, it must appear that the fact to be inferred follows inevitably from the facts found; that, upon every conceivable theory of the case, the non-existence of the fact to be inferred is inconsistent with facts found. (*Emmal v. Webb*, 36 *Cal.* 197.) The judgment will not be disturbed on an appeal, because all the facts required in law to sustain the judgment have not been expressly found, if such should prove to be the case; as to such facts, if any there be, findings which will support the judgment are implied, unless we find that some facts have been expressly found by the Court below which are repugnant to it. (*Shelby v. Houston*, *Cal. Sup. Ct., Oct. T.*, 1869; citing *Cal. Pr. Act*, § 180; *Henry v. Everts*, 30 *Cal.* 426; *Sears v. Dixon*, 33 *Id.* 326; *Morrill v. Chapman*, 35 *Id.* 86; *Carpentier v. Small*, *Id.* 355.)

16. Findings Conclusive.—The verdict of the jury or the findings of the Court is final and conclusive of the fact. (*Perry v. Cochran*, 1 *Cal.* 180; *Wheeler v. Hays*, 3 *Id.* 284.) The finding of a court will not be disturbed, unless the evidence was such that, if the question at issue had been submitted to a jury, and they had rendered

a verdict in accordance with the finding, the Court would have set it aside as contrary to evidence. (*Moore v. Murdock*, 26 *Cal.* 514.) The application of the rule that findings will not be disturbed on appeal, when there is a manifest conflict in the evidence, depends in no measure upon the question whether any of the witnesses are interested in the event of the suit. The credit to be given to their testimony, however attacked, must be determined in the court below. (*Putnam v. Lamphier*, 36 *Cal.* 151; consult "*Appeal*.") If no motion is made for a new trial, the findings of the Court and verdict of the jury are conclusive as to the facts. (*Brown v. Tolles*, 7 *Cal.* 399; *Garwood v. Simpson*, 8 *Cal.* 108; *Rhine v. Bogardus*, 13 *Cal.* 73; *Duff v. Fisher*, 15 *Cal.* 379; *Gagliardo v. Hoberlin*, 18 *Cal.* 395; *Allen v. Tennon*, 27 *Cal.* 68.) Or where they are not excepted to. *Gray v. Moss*, 34 *Id.* 125.

17. Finding Contrary to Stipulation.—If the finding of a fact on a material point is contrary to a stipulation of the parties made in the course of the trial as a substitute for evidence, a new trial will be granted, on the ground that the finding is contrary to the fact as stipulated, and therefore unsupported by the evidence. *Carpentier v. Small*, 35 *Cal.* 346.

18. Findings, when not Necessary.—When the facts are admitted or not denied in the pleadings. (*Swift v. Muygridge*, 8 *Cal.* 445; *Fox v. Fox*, 25 *Cal.* 587; *Burnett v. Stearns*, 33 *Cal.* 468; *Green v. Clark*, 31 *Cal.* 591; *Nosler v. Haynes*, 2 *Nev.* 53; *Downer v. Sexton*, 17 *Wis.* 29; *Carlisle v. Melhern*, 19 *Mo.* 56.) Or when judgment is rendered on the pleadings. *Taylor v. Palmer*, 31 *Cal.* 242; *Nosler v. Haynes*, 2 *Nev.* 56.

19. Forcible Entry and Detainer.—Where several persons ousted the plaintiff, in forcible entry and detainer, and only one is sued, the Court should not instruct the jury to find for the plaintiff if he was in possession and was ousted; the words "by defendant" should be inserted in the instruction after the word "ousted." *Ross v. Roadhouse*, 36 *Cal.* 580.

20. Fraud.—A special finding on the question of fraud should always be taken. (*Davis v. Robinson*, 10 *Cal.* 411; *Gillan v. Metcalf*, 7 *Id.* 137.) Where an infant files a bill to set aside a decree for fraud in fact in procuring it, and for fraud because the decree does not

reserve to the infant a day in court after coming of age to contest it, and the Court finds against the infant on his charge of fraud in fact, the finding is conclusive of the whole case, unless there is a very clear mistake of the Court as to the fact of fraud. (*Regla v. Martin*, 19 *Cal.* 463.) In an action against an attorney to set aside certain conveyance of property made to him by his client, on the ground of fraud practiced by the attorney in their procurement, and inadequacy of consideration, if to the contrary, it be found that said consideration was fair and adequate, and that the client was willing to sell the property, then the further finding by the Court that there was no fraud practiced by the attorney becomes immaterial for all purposes of the appeal by plaintiff. *Kisling v. Shaw*, 33 *Cal.* 425.

20. General and Special Pleadings.—The decision need not do more than find generally. (*Johnson v. Whitlock*, 3 *Kern.* 334; *Otis v. Spencer*, 16 *N.Y.* 610; 6 *Abb. Pr.* 127; 15 *How. Pr.* 425.) But when the Court sits as a jury in the trial of a cause, it must in all cases find the facts specially. (*Breeze v. Doyle*, 19 *Cal.* 101.) If discrepancy exists between the special and general findings in a case, the special findings must control. (*Leese v. Clark*, 20 *Cal.* 387; *Hidden v. Jordan*, 28 *Id.* 301.) Findings stating: *First*, That the material allegations in plaintiff's complaint and replication are true; *Second*, That the material allegations in defendant's answer are not true; are insufficient in not specifying distinctly the allegations which are material. (*Breeze v. Doyle*, 19 *Cal.* 101.) A general finding by the Court, that "all the allegations and averments in plaintiff's complaint are true, and that all in the answer are untrue," is sufficient and conclusive of all the material issues made by said pleadings. (*Pralus v. Pacific G. and S. M. Co.*, 35 *Cal.* 30; *Downer v. Sexton*, 17 *Wis.* 29.) Where a judgment for plaintiffs is rendered upon general or special findings for them, without, however, containing any reference to or express findings upon issues tendered by the answer in bar of the action, it will be presumed that all the tendered issues were found against the defendants. *Steinbach v. Krone*, 36 *Cal.* 303.

21. Jurisdiction.—If the findings of the Court be that defendant was duly served with process, it is sufficient to establish the fact of jurisdiction on that ground. *Lick v. Stockdale*, 18 *Cal.* 219.

22. Membership in Company.—Where one defendant pleads that he is not a member of the company sued, and the Court finds that

the allegations of the complaint are true, and that he is a member of the company, as to plaintiff, Parke, the finding is sufficient. *Parke v. Hinds*, 14 *Cal.* 415.

23. Money Deposit.—The finding of the Court that money was deposited with one, to be held by him on deposit, and in trust for a party, is not open to the objection that it does not specify the kind of deposit. *Schroeder v. Jahns*, 27 *Cal.* 274.

24. Note.—Where the declaration was upon a note, and the Court found that the note was never given, but that the indebtedness was for merchandise sold: *Held*, that the finding was against the averment, and could not support the judgment. *Lewis v. Myers*, 3 *Cal.* 475.

25. Note and Mortgage.—That "it appears from the note and mortgage sued on that there was due plaintiff, at the date of the commencement of this suit, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of \$2,000," it is ordered, etc., is a sufficient finding of the execution and delivery of the note and mortgage. *Holmes v. West* 17 *Cal.* 623.

26. Practice on Findings.—The Court should first ask counsel on both sides if they desire findings, and if they do, reserve its judgment, and direct each side to prepare and submit such questions of fact as they desire to have found. (*Tewksbury v. Magraff*, 33 *Cal.* 237.) And the party requiring a finding should specify the point upon which he desires it, without dictation. (*Miller v. Stern*, 30 *Cal.* 402; *Hevoy v. Kerr*, 21 *How. Pr.* 409.) The Court may file written findings, whether requested or not. (*Russell v. Amador*, 2 *Cal.* 305; *Gay v. Moss*, 34 *Cal.* 125; *Sands v. Church*, 6 *N.Y.* 347; *Burger v. Baker*, 4 *Abb. Pr.* 11.) It is the right of the Judge of the Court to sign and file his finding, whether drafted by himself or another, without notice to the attorneys of the parties; and in doing so his sole duty is to see that they are proper, and in conformity with his view of the facts and law of the case. *Hathaway v. Ryan*, 35 *Cal.* 188.

27. Presumptions.—That the findings were supported by the evidence; (*O'Connor v. Stark*, 2 *Cal.* 153; *Owen v. Morton*, 24 *Cal.* 377; *Jenkins v. Frink*, 30 *Cal.* 586;) and that evidence was competent and sufficient. (*Sears v. Dixon*, 33 *Cal.* 326.) That facts not found were proved (*Lyons v. Leimback*, 29 *Cal.* 139; *Henry v. Everts*, 30 *Cal.*

425.) All the issues of fact raised by the answer are deemed to have been found in favor of the party who receives judgment. (*Buckhout v. Swift*, 27 *Cal.* 433.) That facts necessary to sustain the judgment and not contained in the findings were found by the Court. (*James v. Williams*, 31 *Cal.* 211.) And where findings are silent as to the material points necessary to support the judgment, it will be presumed that the necessary facts were proved, unless the contrary appear. (*Athearn v. Poppe*, 25 *Cal.* 631.) That the facts found were consistent with the judgment. (*Tewksbury v. Magraff*, 33 *Cal.* 237; *Parker v. Page*, *Cal. Sup. Ct., Jul. T.*, 1869.) But, where there is no issue tendered in the pleadings upon a material matter, the Court or jury will not be presumed to have found on such matter. (*Gifford v. Carvill*, 29 *Cal.* 589; *Bernal v. Gleim*, 33 *Id.* 668.) Where there is no finding of facts incorporated in the case, the presumption is that the decision thereon was correct. (*Matthews v. Mayor of New York*, 14 *Abb. Pr.* 214; *Viele v. Troy and Boston R.R. Co.*, 20 *N.Y.* 184.) If the findings of fact are defective on any material point, and are not excepted to, it will be presumed that the Court found on those points against the losing party. *Carpentier v. Small*, 35 *Cal.* 346; consult "*Appeal.*"

28. Separate Statement in Findings.—In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly. (*Cal. Pr. Act*, § 180.) Facts must be found and set forth separate from the conclusions of law. *Russel v. Amador*, 2 *Cal.* 305; affirmed in *Bowers v. Johns*, 2 *Cal.* 419; *Hoagland v. Clary*, 2 *Cal.* 474; and *Brown v. Brown*, 3 *Cal.* 111; *Bryan v. Maume*, 28 *Id.* 238; *Marmaduke v. McMasters*, 24 *Mo.* 51; *Skinner v. Ellington*, 15 *Mo.* 488; *Hulce v. Sherman*, 13 *How. Pr.* 411; *Church v. Erben*, 4 *Sandf.* 691; *Peck v. Yorks*, 14 *How. Pr.* 416; *Snooks v. Fries*, 19 *Barb.* 313; *Denning v. Post*, 1 *Code R.* 121; *Doke v. Peek*, 1 *Code Rep.* 54; *Regan v. McCoy*, 26 *Mo.* 166; *Sutter v. Streit*, 21 *Id.* 157; see *Sharp v. Wright*, 35 *Barb.* 236.

29. Sufficient Statement.—A finding of facts must state conclusions of facts as well as mere evidence. (*Thomas v. Sprague*, 12 *Mich.* 120.) And warrant the conclusions of law and judgment thereon (*Pearce v. Burns*, 22 *Mo.* 577; *Pearce v. Roberts*, 22 *Id.* 582; *The State v. Ruggles*, 23 *Id.* 339; *Tomlinson v. Mayor of N.Y.*, 23 *How. Pr.* 452; *Rogers v. Beard*, 20 *How. Pr.* 98) from the evidence. The

facts and not the evidence should be set out. (*Heredink v. Holton*, 16 *Cal.* 103; *Kalkman v. Baylis*, 23 *Id.* 303; *Javens v. Harris*, 20 *Mo.* 262; *Murdock v. Finney*, 21 *Id.* 138; *Sutter v. Streit*, *Id.* 157.) Facts found should not be mingled with argument. (*Brigan v. Maume*, 28 *Cal.* 238; *Jones v. Block*, 30 *Cal.* 227.) An opinion is not a finding; (*McCloy v. McCloy*, *Cal. Sup. Ct., Oct. T.*, 1869; citing 28 *Cal.* 305; 30 *Id.* 229; and 31 *Id.* 211; *Hidden v. Jordan*, 28 *Cal.* 301;) but conclusions from facts are. (*Sears v. Dixon*, 33 *Cal.* 326.) The opinions of the Court, the reasons of the Judge, or the evidence, form no part of the findings. (*James v. Williams*, 31 *Cal.* 211; *Burke v. Table Mt. Wat. Co.*, 12 *Cal.* 403; *Mills v. Thursby*, 12 *How. Pr.* 417; *Thomas v. Tanner*, 14 *How. Pr.* 426; *Magie v. Baker*, 14 *N.Y.* 435.) Where the fact found by the Judge, and the very one, in his opinion, upon which the case turns, is wholly unsupported by evidence, the appellate court will not treat such findings as surplusage in order to sustain the judgment on other findings, especially if the weight of testimony is against the other findings. *Lockhart v. Mackie*, 2 *Nev.* 294.

30. Sufficiency, Test of.—The true test of the sufficiency of the findings is this: Would they answer if presented by a jury in the form of a special verdict. (*Miller v. Steen*, 30 *Cal.* 402.) Findings are sufficient when they cover all the issues made by the pleadings, whether supported by the evidence or not. (*Rice v. Inskeep*, 34 *Cal.* 225.) It is sufficient if the findings are not repugnant to or inconsistent with the judgment. *Sears v. Dixon*, 33 *Cal.* 326; *James v. Williams*, 31 *Cal.* 211.

31. Trespass.—Where, in an action of trespass, the jury find generally "for the plaintiffs," it concludes the parties upon a question of title where it was distinctly put in issue. *McLaughlin v. Kelly*, 22 *Cal.* 211.

CHAPTER IV.

TRIAL BY JURY.

1. Either party may bring the issue to trial or to a hearing, and in the absence of the adverse party, unless the Court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require. (*Cal. Pr. Act*, § 157.) Either party may demand a jury to try the issues, as the right of trial by jury shall be secured to all, and remain inviolate for ever. (*Const. of Cal.*, *Art. I.*, § 3; *Bank of Mission v. Anderson*, 1 *Mo.* 244.) The right to trial by jury is absolute, and cannot be interfered with. (*Greason v. Keteltas*, 17 *N.Y.* 491; *Sharp v. Mayor of N.Y.*, 18 *How Pr.* 213; 9 *Abb. Pr.* 426; *Lewis v. Varnum*, 12 *Abb. Pr.* 305; *Reubens v. Joel*, 3 *Kern.* 488.) As to the propriety of a trial by jury where there is an issue of fraud, see *Freeman v. Atlantic Mut. Ins. Co.*, 13 *Abb. Pr.* 124.

2. When the Sheriff is a party to the action, the Court may order the cause tried by a special jury to be summoned by the Coroner. (*Pacheco v. Hunsaker*, 14 *Cal.* 120.) The Statute vests the ordering of a trial by jury in the discretion of the Court. (*Pacheco v. Hunsaker*, 14 *Cal.* 120.) In Oregon, the Court, having discharged the regular panel jurors in attendance, cannot order another panel, and compel the defendant to go to

trial unwillingly. *Mousseau v. Verder, S. Ct. Oregon*, 13.

EMPANNELING JURY.

3. The action being called for trial, the jury will be drawn and empaneled in the manner prescribed by statute. (*Cal. Pr. Act*, § 159; *Laws of Or.* § 178; *Wash. Terr.* § 200; *Idaho*, § 159; *Arizona*, § 161.) It shall consist of twelve persons, unless the parties consent to a less number, but not less than three; and such consent must be entered by the Clerk in the minutes of the trial. (*Gilespie v. Benson*, 18 *Cal.* 409; *United States v. Insurgents of Penn.*, 2 *Dall.* 335; *Bonaparte v. Camden and Amboy R.R. Co.*, *Baldw.* 205; *Bank of Missouri v. Anderson*, 1 *Mo.* 244.

4. Upon demand of either party for a jury trial, the Court will order a venire to issue. The time provided by the Statute in which the jury shall be returned by the Sheriff is directory. (*Mowry v. Starbuck*, 4 *Cal.* 274; *People v. Ferris*, 1 *Abb. Pr. (N.S.)* 193.) If a party waits until the trial is entered upon before applying for a jury trial, it is a waiver of his right. *McKeon v. See*, 4 *Robt.* 449; *Barlow v. Scott*, 24 *N.Y.* 40; *Moffatt v. Mount*, 10 *Bosw.* 468.

5. The first act done by the Clerk is to take the panel returned by the Sheriff, so far as they have appeared, and not been excused by the Court, and copy the names upon separate ballots, which he then puts in a box provided for that purpose. When a case is called for trial by a jury, he is to draw twelve names from the box, and call them off as he draws them. The persons so drawn and called are to take their seats on the jury-

box. If there are not twelve ballots in the box, the Sheriff, under the direction of the Court, is to summon from the body of the County, and not from by-standers, so many qualified persons as may be required to complete the jury.

6. When the jury-box is full, and not before, counsel are to proceed to examine them touching their qualifications. All who are challenged, either for cause, if allowed, or peremptorily, are to retire from the box; and when the first twelve have all been examined, the vacant seats, if any, are to be filled in the same manner as at first, and so on till the jury is completed. When the jury is thus completed, and not before, they are to be sworn to try the case; and the peremptory challenges may be made at any time before the jury is sworn to try the case. (See *People v. Mellville, Cal. Sup. Ct., Jul. T., 1869.*) The essential difference between the civil and criminal practice is that in the former none are to be sworn to try the case until the jury is complete, while in the latter those accepted may be sworn to try the case before the jury is finally completed. (*People v. Scoggins, Cal. Sup. Ct., Jul. T., 1869.*) In Washington Territory, in the drawing and formation of the jury, it is the practice to set aside the ballots with the names of those drawn till they are discharged, when they are returned to the box. *Code of Wash. Terr.* § 205.

QUALIFICATIONS OF JUROR.

7. No one shall be qualified to act as a juror unless he be, *First*, a citizen of the United States, an elector of the county in which he is returned, and a resident of the township at least three months before being selected

and returned. (*Gen. Laws of Cal.* ¶ 3,870; *Sampson v. Schaffer*, 3 *Cal.* 107.) Residence depends upon intention as well as fact, and mere inhabitancy for a short period, against the intention of acquiring a domicile, would not make a resident. (*People v. Peralta*, 4 *Cal.* 175.) A citizen of this State, who has resided in the county fourteen days, and then been absent some months from the State, with the intention of returning to reside in the county, and has returned and resided in the county some fourteen days, is a competent juror. (*People v. Stoneciefr*, 6 *Cal.* 405.) *Second*, In possession of his natural faculties. (*Gen. Laws of Cal.* ¶ 3,870.) *Third*, One who has sufficient knowledge of the language in which the proceedings of the courts are had. (See *People v. Arceo*, 32 *Cal.* 40.) *Fourth*, Assessed on the last assessment roll of his township or county, on real or personal property, or both, belonging to him, if a resident, at the time of the assessment. *Laws of Cal.* 1863-4, p. 462; *People v. Thompson*, 34 *Cal.* 671; *Valton v. Nat. Loan Fund Ins. Co.*, 17 *Abb. Pr.* 286.

8. A person shall be incompetent and disqualified to act as a juror if he do not possess the above qualifications, or if he be convicted of a felony or misdemeanor involving moral turpitude, or if he be a professional gambler. (*Gen. Laws of Cal.* ¶ 3,871.) As to qualifications requisite in the various counties, see (*Gen. Laws of Cal.* ¶¶ 3,907-3,908.) As to when persons shall be exempt from liability to serve as a juror, see (*Gen. Laws of Cal.* ¶ 3,872.) In particular counties, see ¶ 3,909.

9. The jury having been called are sworn to answer

questions relative to their qualifications as jurors to hear the particular case then on trial. They are then questioned by counsel of either side as to their knowledge of the parties, or the facts of the case, or as to whether they have formed or expressed an opinion of the merits of the cause, or upon any other question touching their fitness or fairness as jurors. *Watson v. Whitney*, 23 *Cal.* 375.

OBJECTIONS TO THE PANEL.

10. Objections to the panel may be interposed for an irregularity in the formation of the jury, which goes to the merits of the trial, or leads to the inference of improper influence upon their conduct. (*Thrall v. Smiley*, 9 *Cal.* 538.) In Oregon, no challenge to the panel is allowed. (*Law of Or.* § 179.) No objection being taken to the manner of impanneling a jury, it is waived. (*Dayharsh v. Enos*, 1 *Seld.* 531; *Mayor of N.Y. v. Mason*, 1 *Abb. Pr.* 352; *Hardenburgh v. Crary*, 15 *How. Pr.* 307.) In Nevada, a challenge to the panel of trial jurors must be in writing, specifically stating the grounds of challenge, or facts on which the challenge is based. *State v. Millain*, 3 *Nev.* 411.

11. In New York, upon the challenge of the array, the practice is, that if the facts are denied, the Court appoints triers, and if they pronounce the cause of challenge unfounded, the trial proceeds. If the facts are admitted, the Court passes upon their sufficiency, and either quashes the array or overrules the challenge. *Gardner v. Turner*, 9 *Johns.* 260.

12. No regular panel having been drawn and summoned, the Court ordered thirty-six jurors to be sum-

moned, twenty-seven of whom appearing, the Court caused their names to be put in a box, from which twelve were drawn to constitute a trial panel. *Held*, not to be ground for challenge to the whole panel. (*People v. Stuart*, 4 *Cal.* 225.) But where the Clerk drew seventy-two names out of the box, and selected thirty-six of them, it was a good ground of challenge to the array. (*Gardner v. Turner*, 9 *Johns.* 260.) That a jury has just tried a case involving the liability of defendant for a similar cause of action does not render it incompetent. (*Algiers v. Steamer "Maria,"* 14 *Cal.* 167.) So, if the venire is executed and returned by any other person than the Sheriff. (*Cooper v. Bissell*, 16 *Johns.* 146.) So, where the Sheriff who served the venire was a party to the action. (*Woods v. Rowan*, 5 *Johns.* 133.) For default or partiality in the Clerk, or if the Clerk select the jury, instead of drawing by lot. (*Pringle v. Huse*, 1 *Cow.* 432; *Gardner v. Turner*, 9 *Johns.* 260.) But an objection on the ground that the jury was summoned by order of the Court, after the commencement of the term, is no ground of challenge to the panel. *People v. Rodriguez*, 10 *Cal.* 59.

13. A jury drawn while the Court was in session, in the presence of the Court and its officers, must be held to have been drawn in open Court, whether it was done in the room where the Court usually sits or in another. (*State v. Millain*, 3 *Nev.* 409.) The object is to secure honest and intelligent men for the jury, and the order or time in which they are served is of no consequence. *Thrall v. Smiley*, 9 *Cal.* 530.

14. A variance between the true name of a juror and that placed on the jury list is immaterial, if it satis-

factorily appears that the person attending is the one really selected. (*State v. McNamara*, 3 *Nev.* 71.) Nor that the name of a juror was not on the venire returned by the Sheriff. (*Thrall v. Smiley*, 9 *Cal.* 538.) In New York, it is no ground of challenge to the array that the Clerk who drew the jury was at the time attorney in the cause. (*Wakeman v. Sprague*, 7 *Cow.* 720.) Nor that juries for two courts were drawn from the box at the same time, the two sets of names being kept distinct. *Crane v. Dygert*, 4 *Wend.* 675.

CHALLENGE TO JUROR.

12. After questioning the jurors, counsel may challenge, either peremptorily or for cause. Each party shall be entitled to four peremptory challenges, and no reason need be given for the exercise of this right. (*Cal. Pr. Act*, § 161; *Laws of Idaho*, § 161; *Arizona*, § 163.) In Oregon and Washington Territory, only three peremptory challenges are allowed. (*Laws of Oregon*, § 187.) Either party may exercise his right of peremptory challenge at any time after examination, but neither party can be required to exercise it prior to this stage of the proceedings. (*People v. Scoggins*, *Cal. Sup. Ct., Jul. T.*, 1869.) And when there are several parties on either side, they shall join in a challenge before it can be made. (*Cal. Pr. Act*, § 161.) Where only one peremptory challenge is shown to have been used, it is presumed the other three were not used. (*Fleeson v. Savage Silv. Min. Co.*, 3 *Nev.* 157.) As to right of challenge and its exercise, see, generally, *Walter v. People*, 32 *N.Y.* 147.

13. In California, a general challenge of a juror for

cause, without specifying the particular grounds, is insufficient; it is not sufficient to say, "I challenge for cause," and then stop. (*Paige v. O'Neal*, 12 *Cal.* 483.) In Oregon, a challenge for cause may be either general or special. (§ 181.) General causes of challenge are: *First*, A conviction for a felony; *Second*, A want of any of the qualifications prescribed by law for a juror; *Third*, Unsoundness of mind. (§ 182.) And particular causes of challenge are: *First*, Implied bias; and, *Second*, Actual bias. (*Id.* 183; 1 *Den.* 307, 308.) Implied bias may be imputed in the following cases: *First*, Consanguinity or affinity within the fourth degree; *Second*, Occupying the relation of guardian and ward, etc.; *Third*, Having served as a juror in a former action between the same parties or for the same cause of action; *Fourth*, Interest in the event of the suit. *Laws of Oregon*, § 184.

GROUND'S OF CHALLENGE.

A challenge for cause may be made on the grounds:

14. *First*, Incompetency or disqualification under the Statute. (*Gen. Laws of Cal.* ¶ 3,871; *Oregon Code*, § 181.) Where, after trial had commenced, it was found that a juror had been a resident of the State only three months, it was *held*, that the juror was competent. *Thompson v. Paige*, 16 *Cal.* 78.

15. *Second*, Consanguinity within the third degree. (*Cal. Pr. Act*, § 162; *Oregon Code*, § 184.) As to incompetency of jurors from relationship or interest, see *Young v. Marine Ins. Co.*, 1 *Cranch C. Ct.* 452; *Comm. Council of Alexandria v. Brockett*, *Id.* 505; *Orme v. Pratt*, 4 *Id.* 124.

16. *Third*, Occupying the relation of guardian and ward, etc. (*Cal. Pr. Act*, § 162; *Oregon Code*, § 184.) A tenant of either of the parties to the suit. *Hathaway v. Helmer*, 25 *Barb.* 29.

17. *Fourth*, Former service as juror or witness on a previous trial of the same cause. The Court may exercise its discretion in excusing a juror under the fourth subdivision, for former service as juror or witness in a previous action. *Grady v. Early*, 18 *Cal.* 108.

18. *Fifth*, Interest in the event of the suit. Jurors must be wholly disinterested. *Wood v. Stoddard*, 2 *Johns.* 194.

19. *Sixth*, Having formed or expressed an unqualified opinion or belief as to the merits of the action. The formation of an opinion adverse to the validity of title, in an action of ejectment, is good ground, under the sixth subdivision. (*White v. Moses*, 11 *Cal.* 68.) Simply "knowing and being aware of the circumstances connected with the affair" is not sufficient grounds. (*Lawrence v. Collier*, 1 *Cal.* 37.) It is good cause of challenge to a juror, that he has previously given his opinion on the question in controversy. (6 *Cow.* 555; *Blake v. Millspaugh*, 1 *Johns.* 316; *Rogers v. Rogers*, 14 *Wend.* 131; *Lord v. Brown*, 5 *Den.* 345.) A juror having said that "if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff was right," *held*, not sufficient ground for challenge. (*Durell v. Mosher*, 8 *Johns.* 445.) It is only an unqualified opinion on the mind of the juror that disqualifies. *State v. Millain*, 3 *Nev.* 409.

20. *Seventh*, Bias against a party to the action.

(*Cal. Pr. Act*, § 162; *Laws of Idaho*, § 162; *Laws of Arizona*, § 164.) Bias or prejudice of any kind is good ground for challenge under the seventh subdivision. (*People v. Reyes*, 5 *Cal.* 347; *Smith v. Floyd*, 18 *Barb.* 522; *Chouteau v. Pierre*, 9 *Mo.* 3.) The juror being in a state of mind more frequently founded in passion than in reason, prejudice, in the eye of the law, has no degrees. (*People v. Reyes*, 5 *Cal.* 347.) Actual bias may be taken for the existence of such a state of mind that he cannot try the issue impartially. (*Laws of Oregon*, § 185; 3 *Den.* 124.) Challenge, how taken. (*Laws of Oregon*, §§ 188, 189.) To ask a person whether he is prejudiced or not against a party, and if so, whether that prejudice is of such a character as would lead him to deny the party a fair trial, is the simplest method of ascertaining the state of his mind. (*People v. Reyes*, 5 *Cal.* 347.) A mason or a royal arch-mason is not disqualified from sitting on a jury where another mason of the same degree is a party. *Purple v. Horton*, 13 *Wend.* 9.

CHALLENGE, HOW TRIED.

21. Challenges for cause shall be tried by the Court, and witnesses may be examined. (*Cal. Pr. Act*, § 163; *Laws of Oregon*, § 190; *Wash. Tr.* § 203; *Idaho*, § 163; *Arizona*, § 165.) The challenged person may be sworn as a witness. (*Id.*; *Pringle v. Huse*, 1 *Cow.* 432; *Mechanics' and Farmers' Bank v. Smith*, 19 *Johns.* 115.) In New York, the challenge for favor or bias may be tried by the triers. (*Pringle v. Huse*, 1 *Cow.* 432; *Freeman v. People*, 4 *Den.* 935; *Smith v. Floyd*, 18 *Barb.* 522.) But, for having expressed an opinion upon the merits of the action, it must be tried by the

Court. (*Pringle v. Huse*, 1 *Cow.* 432.) When a judge, by consent of parties, acts as trier upon the challenge of a juror, his rejection of evidence is final, and cannot be reviewed on appeal. *Costigan v. Cuyler*, 21 *N.Y.* 134.

22. If a juror is challenged for cause, etc., that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise the inference that the challenging party is thereby injured. (*Fleeson v. Savage Silv. Min. Co.*, 3 *Nev.* 157.) A party who accepts a juror, knowing him to be disqualified, waives the objection. *People v. Stonecifer*, 6 *Cal.* 411.

JURY SWORN.

23. The challenges having been exhausted, or exercised to the satisfaction of the parties, the jury is sworn to try the cause, that they, each of them, will well and truly try the matter at issue between, the plaintiff, and, the defendant, and a true verdict render according to the evidence. (*Cal. Pr. Act*, § 160; *Laws of Oregon*, § 193; *Wash. Ter.* § 204; *Idaho*, § 160; *Arizona*, § 162.) Where, before the trial of an action of *assumpsit*, brought against three persons, and two of the defendants confess judgment, but the damages had not been assessed, it is proper to swear the jury as to the remaining defendant. *Noble v. Laley*, 50 *Penn.* 281.

EVIDENCE ADDUCED.

24. The jury having been sworn to try the case, counsel for plaintiffs states briefly the facts which constitute his cause of action, and then introduces his proofs; upon the close of which defendant states the

nature of his defense, set-off, or counter claim, as the case may be, and proceeds with his proofs.

IN PARTICULAR CASES.

25. Divorce.—The testimony of a witness employed to watch and detect a husband or wife suspected of adultery, though it is competent, and ought not to be absolutely rejected, is to be received with great caution, and scrupulously and minutely scrutinized. (Anonymous, 17 *Abb. Pr.* 48.) The fact that a witness is a prostitute, and the keeper of a house of ill fame, does not warrant an entire rejection of her testimony, but a conviction of adultery should not be founded on facts established by her evidence solely. (Anonymous, 17 *Abb. Pr.* 48.) So, where the circumstances as to which she is corroborated do not inevitably lead to the conclusion that adultery has been committed, her testimony is insufficient. *Id.*

26. Ejectment.—The question presented, whether a judgment in an action of ejectment in which the landlord of the defendant defends the action for and in the name of his tenant, and puts his own title in issue, is admissible in evidence by way of estoppel in an action of ejectment brought by the same plaintiff against such landlord. *Russell v. Mallon, Cal. Sup. Ct., Jul. T., 1869.*

27. Forcible Entry and Detainer.—In an action for forcible entry and detainer, in order for the plaintiff to recover possession of land held by pre-emption, it is indispensable to prove that the premises upon which the defendant entered were within the lines described in the plaintiff's affidavit. (*Cummins v. Scott, 20 Cal. 83.*) On the trial of an action of forcible entry and detainer, the plaintiff offered in evidence a judgment against defendant awarding possession of the land, and the writ of restitution issuing on the same, and the Sheriff's return thereon: *Held*, to be competent evidence, for the purpose only of showing the extent of plaintiff's possession, and that defendant was estopped from contesting the same. (*Mitchell v. Davis, 23 Cal. 381.*) If the plaintiff relies on an unlawful entry and a subsequent forcible detainer, a deed of conveyance of the property to the defendant or his lessor is admissible in evidence in his behalf, to show the good faith of his entry; but if the plaintiff relies on a forcible entry and detainer, such deed is not admissible. *Thompson v. Smith, 28 Cal. 527.*

28. Foreclosure.—It is not necessary to rely on the affidavits filed, in a statutory foreclosure of a mortgage, as proof of the regularity of the steps taken for such foreclosure; since it may be supplied *aliunde* by other evidence. *Chalmers v. Wright*, 5 *Rob.* 713.

29. Insurance.—In an insurance case, the omission to furnish the insurers with any documentary evidence touching the nature and extent of the loss will not defeat the action, unless it appear or be presumed that there is such evidence within the possession of the insured; and demand must be made in due season in order to render the objection available on the trial. *Foster v. Jackson Marine Ins. Co.*, 1 *Edm.* 290.

30. Slander.—In an action of slander for words spoken in the presence and hearing of the plaintiff, and immediately after the defendant had uttered the slanderous words the plaintiff replied to them, which reply the plaintiff offered to prove on the trial, and the Court refused to hear such proof: *Held*, that such ruling of the Court was error, as the reply might have qualified or explained the slanderous words, or shown in what sense they were uttered, or might have even admitted their truth. (*Bradley v. Gardner*, 10 *Cal.* 371.) The defendant may prove the reply by plaintiff immediately after defendant uttered the slanderous words. *Bradley v. Gardner*, 10 *Cal.* 371.

31. Replevin.—In replevin, evidence may be admitted of the highest market value of the property between the time of conversion and trial. (*Tully v. Harloe*, 35 *Cal.* 302.) But, if the answer in replevin admits the value of the property averred in the complaint, evidence should not be admitted as to its value. (*Id.*) For the purpose of determining the value of the property at the place of detention, and where also delivery should have been made, evidence is admissible of its value at the place of market, the costs of transportation thither, and the usual expenses of sale. (*Hisler v. Carr*, 34 *Cal.* 641.) When the vendee replevied the goods, and only established title by proving a possession of several months, it was competent for the defendant, on cross-examination, to ask in whose possession the chattels were at a certain period anterior to the possession proved by plaintiff, in order to draw from him the fact that plaintiff's possession was a fraud to hide the debtor's property. (*Thornburgh v. Hand*, 7 *Cal.* 554.) Where, plaintiff relied exclusively upon his possession at the time of the taking by defendant; and defendant, having first established a *prima facie*

title sufficient to destroy the presumption of title in plaintiff arising from his possession: *Held*, that the introduction of further evidence by defendant, showing the invalidity of the judgment, was of no advantage to him, as he had already rebutted plaintiff's case based solely on possession. (*Lafontaine v. Greene*, 17 Cal. 294.) In a suit by a claimant of attached property, against the Sheriff, the testimony of a subsequent attaching creditor, who has executed an indemnifying bond to the Sheriff, is not admissible. *Landsberger v. Gorham*, 5 Cal. 450.

PRIVILEGED COMMUNICATIONS.

32. Attorney and Client.—Confidential communications made by a client to an attorney, respecting the business he is employed to transact, are privileged, and the attorney cannot be compelled to disclose them; but the matter must be communicated to the attorney professionally, and in the usual course of business. But statements made by the client to other persons at the time, or by other persons to him, are not privileged, and the attorney is bound to disclose them the same as any other witness. (*Gallagher v. Williamson*, 23 Cal. 331; *Cal. Pr. Act*, § 396; *Hager v. Shindler*, 29 Cal. 72; see *Story's Ep. Pl.* 601; 1 *My. & K.* 115; *Gove v. Harris*, 8 *Eng. L. & Eq.* 149.) If, pending the relation of client and attorney, the client communicates to the attorney a fact foreign to the object for which the attorney was retained, the communication is not confidential. (*Hager v. Shindler*, 29 Cal. 48.) If, after final judgment, he makes disclosures respecting subjects of the foregone employment, the communications are not privileged. (*Id.*) If the attorney receives a deed of the client's property, without consideration, and then, at the client's request, deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds. *Id.*

33. Husband and Wife.—A husband or wife shall not be compellable to disclose any communication made to him or her by the other during marriage. *Cal. Pr. Act*, § 395; see, in criminal cases, *Stat. of Cal.* 1867-8, p. 46.

34. Physician.—A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. *Cal. Pr. Act*, § 398.

35. Priest.—A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs. *Cal. Pr. Act*, § 397.

36. Public Officer.—A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure. (*Cal. Pr. Act*, § 399.) But a judge or any juror may be a witness. *Id.* 400.

37. Witnesses in General.—Where the answer of a witness would subject him to criminal punishment, he is privileged from answering, on the ground solely that he is not compelled to criminate himself. (*Ex parte Rowe*, 7 *Cal.* 184.) The only case where a witness is privileged, on the ground that his answer would disgrace him, is when it is not pertinent to the issue. *Id.*

WHO MAY BE WITNESSES.

38. All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding. *Cal. Pr. Act*, § 391.

39. Insane Persons.—Those who are of unsound mind at the time of their production for examination shall not be competent witnesses.

40. Children.—Children under ten years of age, who, in the opinion of the Court, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, shall not be witnesses. There is no precise age within which children are excluded from giving testimony. Their competency is to be determined by the Court, not by their age, but by the degree of their understanding and knowledge. (*The People v. Bernal*, 10 *Cal.* 66.) And if over fourteen years of age, the presumption is that they possess the requisite knowledge and understanding; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the Court, or under its direction and its presence, before they can be sworn. (*Id.*) Where a witness, being sworn, stated that he

was fourteen years old and a Chileno, and did not know "the obligation of an oath;" whereupon the Judge explained to him the nature of such obligation, and he was then permitted to testify—the other party objecting that he did not know the obligation of an oath: *Held*, that the witness was competent. *Fuller v. Fuller*, 17 *Cal.* 605.

38. Felons.—Persons against whom judgment has been rendered upon a conviction for a felony, unless pardoned by the Governor, or unless such judgment has been reversed on appeal (*Cal. Pr. Act*, § 394), shall not be competent witnesses. Being sentenced on a conviction for petit larceny does not disqualify as a witness. *People v. Shay*, 10 *Abb. Pr.* 413.

39. Mongolians and Indians.—Mongolians, Chinese, or Indians, or persons having one-half or more of Indian blood, in an action or proceeding wherein a white person is a party, are excluded. (*People v. Hall*, 4 *Cal.* 399; affirmed in *Speer v. See Yup Co.*, 13 *Cal.* 73.) But the *indicum* of color is not an infallible test of competency. *People v. Elyea*, 14 *Cal.* 144; affirming *People v. Hall*, 4 *Cal.* 399.

40. Husband and Wife.—A husband may be a witness for or against his wife, and a wife may be a witness for or against her husband, or either of them may be examined as witness in their own behalf, or in behalf of each other, or in behalf of any of the parties, the same as any other witness; except in cases of divorce. (*Cal. Pr. Act*, § 395.) In criminal cases, see (*Stat. of Cal.* 1867–8, p. 46.) The amendment of Section 422, allowing parties to be examined as witnesses in their own behalf, did not, prior to the amendment of Section 395, in 1863, permit husband or wife to be witnesses for or against each other. *Dawley v. Ayers*, 23 *Cal.* 108.

41. Judge or Juror.—The Judge himself, or any juror, may be called as a witness by either party, but in such case it shall be in the discretion of the Court to postpone or suspend the trial, and to take place before another judge or jury. *Cal. Pr. Act*, § 400; see *Davis v. Gallen*, 2 *Cal.* 258.

42. Parties to Suits.—The party or parties to the action, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compella-

ble to give evidence, either *viva voce*, or by deposition, or upon a commission, in the same manner, and subject to the same rules of examination, as any other witness, on behalf of himself, or either or any of the parties to the action or proceeding. (*Cal. Pr. Act*, § 392.) But facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of affecting its credibility. (*Cal. Pr. Act*, § 391.) The law having been changed by the above section in reference to the competency and incompetency of witnesses (*Easterly v. Bassignano*, 20 *Cal.* 496), the decisions in the early cases are no longer law. The right of a party to testify in his own behalf depends entirely on the Statute. (*Reddington v. Waldon*, 22 *Cal.* 185.) The result of the permission given by the Statute has not been to blend in one the different characters of parties and witnesses, nor to obliterate the distinction between the admission of parties against interest, and statement of witnesses out of court, contradictory of their testimony at the trial. *Hall v. Bark "Emily Banning,"* 33 *Cal.* 522.

43. Party Defendant.—The plaintiff may call as a witness any one of the adverse parties, where there are several, and they are sued as joint *tortfeasors*. He is not bound to call all, if he call one. *Rosenbaum v. Hernberg*, 17 *Cal.* 602.

44. Party in his own Behalf.—One of the parties in an action to recover possession of land cannot make himself a witness in his own behalf, for the purpose of defeating the title of the adverse party to the land in dispute, if the adverse party is the grantee of a person no longer living, and the facts he offers to prove transpired before the death of the grantor. *Cal. Pr. Act*, § 393; *Davis v. Davis*, 26 *Cal.* 23.

45. Party Representative.—The word "representative," used in the three hundred and ninety-third section of the Practice Act, as amended in 1863, applies to the executor or administrator of the estate of a deceased person, and also to the person or party who has succeeded to the right of deceased, whether by purchase or descent, or operation of law. (*Davis v. Davis*, 26 *Cal.* 34.) When a surviving partner is sued for a loan for the use of the firm, made to a deceased partner, and of the particulars of which the deceased partner only was cognizant, the plaintiff is not a competent witness in his own behalf. *Roney v. Buckland*, 4 *Nev.* 45.

46. Plaintiff as Witness.—Where the defendant calls the

plaintiff as witness, and the latter testifies to new matter not responsive to the inquiries put to him, the defendant may offer himself as a witness on his own behalf *in respect to such new matter*, but his testimony must be limited to an explanation or contradiction of such new matter. (*Dwinelle v. Henriquez*, 1 *Cal.* 387.) But in (*Drako v. Elkin*, 10 *Cal.* 313,) it was decided that after the examination in chief, the defendant may testify in his own behalf generally, as to the matters in issue.

47. Religious Belief.—And no person shall be disqualified as a witness in an action or proceeding on account of his opinions on matters of religious belief, or by reason of his interest in the event of the action or proceeding, as a party thereto or otherwise. (*Cal. Pr. Act*, § 392.) This section of the Practice Act, and the fourth section of Art. I. of the Constitution, mean that a witness is competent, without respect to his religious belief, or independent thereof. *Fuller v. Fuller*, 17 *Cal.* 605.

PRACTICE ON EVIDENCE.

48. Contradictory Statements.—Where a witness is subject to be impeached by proof of contradictory statements, the precise matter of these contradictions, and the time and place of the statements, must be brought to the knowledge of the witness on cross examination. (*Baker v. Joseph*, 16 *Cal.* 173.) The rule applies equally to evidence of declaration or acts of hostility or ill feeling on the part of the witness. (*Id.*) It is in the discretion of the Court to admit such impeaching evidence, and the party offering such evidence must show error to his prejudice, by putting his exceptions to the ruling of the Court in proper shape. (*Id.*; see *McDaniel v. Baca*, 2 *Cal.* 327.) If the deposition of a witness has been introduced on behalf of one party, the other may prove his confessions or declarations for the purpose of contradicting his deposition or impeaching his credit. *Fox v. Fox*, 25 *Cal.* 587.

49. Cross-Examination.—Courts are apt to take too narrow a view of the rights of cross-examination, confining it to the subject matter of the examination-in-chief. Undoubtedly the cross-examination cannot go beyond that matter, but it ought to be allowed a very free range within it. The witness may be sifted as to every fact touching the matters as to which he testifies, so that his temper, leanings, relations to the parties and cause, his intelligence, the accuracy of his memory,

his disposition to tell the truth, his character, his means of knowledge, his general and particular acquaintance with the subject matter, may be fully tested. *Jackson v. Feather River and Gibsonville Water Co.*, 14 *Cal.* 18.

50. Objection to Competency.—An objection to the competency of a witness, on the ground of interest, should be made at the time his interest is first shown, or it will be deemed waived. (*B.R. and A. Wat. and Min. Co. v. Boles* (No. 2), 24 *Cal.* 359.) Under notice given by a party that he will testify in his own behalf, he has a right to testify on such matters as are specified in the notice, and a general objection to his giving testimony is not well taken. (*Leet v. Wilson*, 24 *Cal.* 398.) As to cross-examination of witnesses, consult *Landsberger v. Gorham*, 5 *Cal.* 460; *Jackson v. F. R. Water Co.*, 14 *Cal.* 18; *Aitken v. Mendenhall*, 25 *Cal.* 212; *People v. Robles*, 29 *Cal.* 421; *Wetherbee v. Dunn*, 32 *Cal.* 106; *People v. Miller*, 33 *Cal.* 99; *Harper v. Lamping*, *Id.* 641.

51. Discretion of Court.—It is in the discretion of the Court to allow or refuse the introduction of further testimony after resting. (*Meyer v. Giedel*, 31 *How. Pr.* 456.) Or to allow a leading question to be put. (*Black v. Camden and Amboy R.R. Co.*, 45 *Barb.* 40.) Or to grant an amendment at the trial. (*Binsrard v. Spring*, 42 *Barb.* 470.) As to the order of admission of relevant testimony, see (*Murphy v. Baker*, 28 *How. Pr.* 251.) As to imposing restrictions on undue latitude of cross-examination, see (*Great West. Turnpike Co. v. Loomis*, 32 *N.Y.* 127). The refusal of a court trying an issue without a jury to consider the testimony as conflicting, or to pass upon the credibility of witnesses, raises no questions reviewable. *Terry v. Wheeler*, 25 *N.Y.* 520.

52. Documentary Evidence.—The exemplification of a decree of divorce must contain all the proceedings, and must show on its face that jurisdiction was acquired. (*Lawrence's Case*, 18 *Abb. Pr.* 347.) Of a record of a will must contain the proofs before the Surrogate. (*Hill v. Crockford*, 24 *N.Y.* 128.) The attestation of a foreign judgment must be signed by the Clerk himself. (*Morris v. Patchin*, 24 *N.Y.* 394.) As to authentication of a Canada judgment, see (*Lazier v. Westcott*, 26 *N.Y.* 146.) Of a judgment of English Privy Council, see (*Jarvis v. Sewall*, 40 *Barb.* 449.) See, as to admission of foreign charter *per se*, (*Brooks Paper Works v. Willett*, 19 *Abb. Pr.* 416.) A

certificate of exemplification of a judgment rendered in another State, when attested by the Clerk under the seal of the Court, and when the presiding Judge of the Court certifies to that attestation as in due form of law, is sufficient, under the Act of Congress of May 26th, 1790, to sustain an action upon the judgment in another State. *Thompson v. Manrow*, 1 *Cal.* 428; *Park v. Williams*, 7 *Id.* 249.

53. Impeachment of Witness.—In a civil action or proceeding, a witness may be discredited or impeached, and for such purpose his general character for honesty, truth, and integrity may be inquired into. (*Stat. of Cal.*, 1867–8, p. 193.) A witness who is called to impeach another may answer that he would not believe such other witness on oath. This is the uniform practice in this State. (*Stevens v. Irwin*, 12 *Cal.* 306.) Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness. It must be restricted to her character for truth and veracity. (*People v. Yslas*, 27 *Cal.* 630.) *Curry, J.*, holds that it should not be confined to her character for truth and veracity, but should extend to her entire moral character; and she may be impeached by testimony showing that her general moral character is bad. *People v. Yslas*, 27 *Cal.* 630.

54. Party not Bound by Statements.—A party is not bound by or held to admit as true statements made by his witnesses during the trial, because he does not deny or contradict them at the time. (*Williams v. Stidger*, 22 *Cal.* 231.) If a party offers a witness to prove the sale of a mining claim under which he claims, and the witness says the sale was in writing, the party is bound by the statement of the witness, and must produce the writing or account for its loss. (*Patterson v. Keystone Min. Co.*, 30 *Cal.* 360.) A party calling a witness is not precluded from proving by another witness the truth of any particular fact in direct contradiction to what the first witness may have testified. *Norwood v. Kenfield*, 30 *Cal.* 393.

55. Recalling Witness.—If the ends of justice require, it is both the right and duty of the Court to permit a witness to be recalled after a party has closed his case. *Fairchild v. Cal. Stage Co.*, 13 *Cal.* 599.

ARGUMENT OF COUNSEL.

56. Upon the close of the evidence of defendant, coun-

sel for plaintiffs open the argument to the jury. Defendant replies, and plaintiff's counsel closes. The Court then instructs the jury as to the law of the case. (*Cal. Pr. Act*, § 166.) As to the right of the party who holds the affirmative and calls the first witness to make the closing address, see (*Elwell v. Chamberlin*, 31 *N.Y.* 611; *Scudder v. Gori*, 18 *Abb. Pr.* 223.) As to allowing the right to close to either party, see (*Fry v. Bennett*, 28 *N.Y.* 324.) On argument of demurrer to one separate defense, another cannot be referred to to sustain it. (*Jackson v. Van Slyke*, 44 *Barb.* 116.) The opening of the cause, introduction of evidence, and summing up by counsel to the jury, or submitting of the cause to the Court or referee on written points and arguments, after the evidence is closed, are parts of the trial of an issue of fact, and the trial is not completed until the cause is finally submitted to the Court, referee or jury. *Mygatt v. Wilcox*, 35 *How. Pr.* 410.

INSTRUCTIONS TO JURY.

57. In charging the jury, the Court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, and, if it state the testimony of the case, it shall inform the jury that they are exclusive judges of all questions of fact. (*Cal. Pr. Act*, § 165.) The instruction by the Court should be a complete charge upon the legal questions to which it relates. (*Bradley v. Lee*, *Cal. S. Ct., Oct. T.*, 1859.) If the Court charge the jury erroneously upon a proposition of law which does not arise in the case, either upon the pleadings or the evidence, and which could not affect the result, the error is immaterial, and will not

cause a reversal of the judgment. *Satterlee v. Bliss*, 36 *Cal.* 489.

58. A judge is bound to instruct a jury upon each proposition of law submitted to him by counsel, bearing upon the evidence. (*Zabriskie v. Smith*, 3 *Kern.* 322.) But he is not bound, without the request of parties, to instruct the jury; and the latter are presumed to be acquainted with all the rules of law in regard to which the parties do not require them to be instructed, or the Court does not instruct them. *Haupt v. Pohlman*, 16 *Abb. Pr.* 301; *Marine Bank of N.Y. v. Clements*, 31 *N.Y.* 33; *Wilklow v. Lane*, 37 *Barb.* 244.

59. If an equity case is treated as an ordinary action at law, and submitted to a jury as such, and the Court considered itself bound and controlled by the verdict as in an action of law, each party has the same right with respect to instruction as if it were a case at law. *Van Vleet v. Olin*, 4 *Nev.* 95.

60. The Court should give or refuse instructions as asked for, and though the phraseology may be modified to make it more intelligible, yet the sense must not be altered. (*Conrad v. Lindley*, 2 *Cal.* 172; *Jamson v. Quiey*, 5 *Id.* 491; *Russell v. Amador*, 3 *Id.* 403; *First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 23 *How. Pr.* 448.) *Held*, that where an instruction asked by defendant, if given entire, would have been erroneous, the Court was not bound to separate the concluding clause, and give that by itself, and was therefore right in refusing the instruction. (*Smith v. Richmond*, 19 *Cal.* 476; *Mayor of N.Y. v. Exchange Fire Ins. Co.*, 9 *Bosw.* 424.) A correct charge by the

Court upon a matter in issue cures a refusal by the Court to give a correct charge upon the same point asked by one of the parties. *Davis v. Perley*, 30 *Cal.* 630.

61. A rule of court requiring counsel to file and submit to the Court any instructions they may offer, before the argument is closed to the jury, does not operate where the cause is submitted without argument. (*Tinney v. Endicott*, 5 *Cal.* 102.) If there is a rule requiring instructions to be handed to the Judge by a certain time in the progress of the trial, it is not error for the Court to refuse instructions not handed in time. *Waldie v. Dall*, 29 *Cal.* 556.

INSTRUCTIONS, HOW GIVEN.

62. Instructions in civil and criminal cases should be drawn with reference to the case as made by the evidence. (*People v. Roberts*, 6 *Cal.* 217.) An instruction of the Court to the jury must be adapted to the facts of the case. (*People v. Honshell*, 10 *Cal.* 87; *People v. Burnes*, 30 *Cal.* 205; *Thompson v. Lee*, 8 *Cal.* 275; *People v. Harley*, *Id.* 390.) Instructions to a jury, asked by a party, which are not pertinent to any issue in the cause, should be refused, even though they embody correct abstract principles of law. *Conlin v. S. F. and S. J. R.R. Co.*, 36 *Cal.* 404; *People v. Roberts*, 6 *Cal.* 217; *People v. Honsell*, 10 *Cal.* 87; *People v. Byrnes*, 30 *Cal.* 206; *Capuro v. Builders' Ins. Co.*, *Cal. Sup. Ct., Jan. T.*, 1870.

63. No instructions should be given to a jury which are not predicated upon some theory, logically deducible from at least some portion of the testimony. (*Peo-*

ple *v. Sanchez*, 24 *Cal.* 28.) Where the answer was insufficient as a denial of the allegations in the complaint, and the Court instructed the jury to find for plaintiff: *Held*, that the instruction was right, no evidence being required on the part of plaintiff. (*Kuhland v. Sedgwick*, 17 *Cal.* 123.) When certain allegations of fact in the complaint are admitted in the answer, an instruction by the Court to the jury that the admitted facts will be taken by them as true, and that they will so find for plaintiff, is not an instruction to the jury to find a verdict in favor of plaintiff, except as to the facts so admitted. *Blood v. Light*, 31 *Cal.* 115.

64. It is not error for the Judge, in stating the testimony of the jury, to read a memorandum of testimony taken by another person, instead of using his own minutes or making the statement from recollection. (*People v. Boggs*, 20 *Cal.* 432.) Whether an instruction, giving the general rule, without qualification, be proper or not, depends on the facts in proof, and the charge would be right or wrong according to the circumstances of the given case. *People v. Arnold*, 15 *Cal.* 482.

INSTRUCTIONS REFUSED.

65. Instructions are properly refused when not warranted by the pleadings. (*Thompson v. Lee*, 8 *Cal.* 275.) To instruct the jury upon mere abstract questions of law, irrelevant to the case, serves only to bewilder and mislead them from the true issue to be determined. (*Gowler v. Smith*, 2 *Cal.* 45; *Id.* 387; *Branger v. Chevalier*, 9 *Id.* 353; *Fairchild v. Cal. Stage Co.*, 13 *Cal.* 599.) Where a party asks an abstract proposition of law, by way of instruction to a jury, he takes the risk of its being correct in all its parts.

(*Thompson v. Paige*, 16 *Cal.* 77.) And a court may refuse an instruction asked, when the same has already been given in substance. (*People v. King*, 27 *Cal.* 509; *Fairchild v. Cal. Stage Co.*, 13 *Cal.* 599; *Belden v. Henriquez*, 8 *Cal.* 87.) If the Court has already given the law correctly to the jury upon a given point, it is not error to refuse a second instruction upon the same point. *People v. Williams*, 32 *Cal.* 280.

66. Where equivalent instructions are given and refused, the Court should place its refusal on the ground that equivalent instructions were given. Unless this is done the jury may be misled. (*People v. Hurley*, 8 *Cal.* 390; *People v. Ramirez*, 13 *Cal.* 152.) A court may refuse to give to the jury an instruction which embraces a question which came properly before the Court, and not before the jury. (*Branger v. Chevalier*, 9 *Cal.* 353.) It is not error for the Court to refuse to instruct a jury, "that where two innocent parties must suffer, that party who had been the cause of another's loss must lose." *Davis v. Davis*, 26 *Cal.* 44.

67. The Court cannot be called upon to charge upon an assumed state of facts, not proven upon the trial. (5 *Sandf.* 542; 12 *Abb. Pr.* 420; 6 *Barb.* 148; *Pratt v. Ogden*, 34 *N.Y.* 20; *Rouse v. Lewis*, 2 *Keyes*, 352; *Hope v. Lawrence*, 50 *Barb.* 258; *Pratt v. Ogden*, 34 *N.Y.* 20; *Trask v. Payne*, 43 *Barb.* 569; *Schwerin v. McKee*, 5 *Robt.* 404.) The Court has no right to charge the jury in regard to conclusions of fact; (*Treadwell v. Wells*, 4 *Cal.* 260;) as it is the province of the jury, unaided by the Court, to say whether a fact is proved or otherwise. *People v. Dick*, 32 *Cal.* 213.

68. It is not error for the Court to refuse to in-

struct the jury upon a point in relation to which there is no evidence. (*Tompkins v. Mahoney*, 32 *Cal.* 231; *People v. Hurley*, 8 *Cal.* 390.) Or where there is only such slight evidence as is plainly insufficient to establish it, it is proper for the Court to instruct the jury to that effect, and withdraw the point from their consideration. (*Selden v. Cashman*, 20 *Cal.* 55.) Or, which assumes a certain fact to exist, respecting which evidence has been introduced before the jury. *Preston v. Keys*, 23 *Cal.* 193.

69. How far it is necessary and proper for the Judge to refer to and comment upon the evidence in the charge is a question of discretion. (*Poler v. N.Y. C. R.R.*, 16 *N.Y.* 476.) It is not error for the Judge to intimate an opinion on a question of fact, if the determination of the question is left by him to the jury. (*Althrop v. Wolf*, 2 *Hilt.* 344.) The Judge is not at liberty to state his opinion on any question, on the supposition that it is a question of law, and afterwards to submit it to the jury as a question of fact. If it is a matter of fact in dispute, he has no right to state his conclusions thereon; if it is a matter of law, he has no right to leave it to the jury. *Vedder v. Fellows*, 20 *N.Y.* 126.

70. The constitutional right of the Court "to state the testimony" to the jury would hardly authorize a judge to express his opinion as to its effect. (*Seligman v. Kalkman*, 8 *Cal.* 216.) Where the charge of the Court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which could properly have been given, or that some of those given are subject to verbal criticism. *Brooks v. Crosby*, 22 *Cal.* 42.

71. In New York, if a request involve several propositions, error in any justifies its refusal. The attention of the Court should be drawn to each and every specific ruling. (*Magee v. Badger*, 34 *N.Y.* 247.) And the proposition submitted must be good in all its parts, or refusal will not be error. (*Wright v. Paige*, 36 *Barb.* 438, 443; see 3 *Den.* 594; 1 *Comst.* 79; 13 *N.Y.* 332; 31 *Barb.* 171; 30 *Id.* 246; 2 *Keyes*, 581; 6 *N.Y.* 233.) The same rule is laid down as to the offer of evidence. (*Hosley v. Black*, 28 *N.Y.* 438; 26 *How. Pr.* 97.) For the practice in New York, consult further 9 *Bosw.* 369; 7 *Bosw.* 396; 31 *N.Y.* 569; 34 *N.Y.* 247, 383; 38 *N.Y.* 184, 175, 39; 34 *How. Pr.* 434; 1 *Keyes*, 532; 2 *Keyes*, 268, 506; 5 *Abb. Pr. (N.S.)* 420; 1 *Edm.* 95; 49 *Barb.* 106.

CHARGE TO THE JURY IN PARTICULAR CASES.

72. **Abandonment.**—In charging the jury upon the question of forfeiture of mining claim, the Court should narrow its charge to such rules or regulations as expressly provide that a non-compliance with their provisions shall be a cause of forfeiture. (*Bell v. Bedrock T. and M. Co.*, 36 *Cal.* 214.) “That if the plaintiff had abandoned the claim, and did not intend to return and work it before the commencement of the suit,” and the Court gave the instruction “subject to the seventeenth section of the Statute of Limitations:” *Held*, that the qualification to the instruction was error. (*Davis v. Butler*, 6 *Cal.* 510.) That “where an abandonment is sought to be established by the act of the party, the intention not to return, his abandonment is as complete, if it exists for a minute, or a second, as though it continued for years; but if he left with the intention of returning, he might do so within five years, provided there was no rule, usage or custom of miners of such a notorious character as to raise a presumption of an intention to abandon:” *Held*, that the question of abandonment was fairly left to the jury. (*Waring v. Crow*, 11 *Cal.* 366.) “That lapse of time does not constitute an abandonment, but that it consists in a voluntary surrender and giving up of the thing by the owner, because he no longer desires to possess

it, or thereafter to assert any right or dominion over it;" and the instruction was given with the qualification: *Held*, that it would be more exact to say in qualification that lapse of time constitutes a material element to be considered in deciding the question of abandonment. *Lawrence v. Fulton*, 19 *Cal.* 683.

73. Boundary of Land.—It is error for the Court to instruct the jury that before the plaintiff can recover, the evidence must specifically fix and establish the eastern boundary line of the grant under which plaintiff claimed, when it appears from the evidence that the land in controversy is within that boundary line. The precise location of that line is of no moment. *Seaward v. Malotte*, 15 *Cal.* 307.

74. Conversion.—Where, in a suit for the value of horses alleged to have been purchased by B., it was proven, among other things, that the horses were purchased for the use of the Overland Mail line, and the Court instructed the jury that, under the evidence, B. was to be considered as sole proprietor of that line: *Held*, that the instruction was wrong, as charging matters of fact; but that as no other conclusion could be arrived at from the evidence, the error could not have prejudiced defendant, and therefore is not ground for reversal. *Pico v. Stevens*, 18 *Cal.* 376.

75. Dedication of Homestead.—Ejectment for land as a homestead. The husband alone had executed a deed to defendant. There was evidence tending to show that the premises was never occupied by plaintiffs with the intention of making them the homestead, and also evidence tending to prove an abandonment of their occupancy, and a residence on other property as that of the family. The court below submitted a series of questions to the jury for a special verdict, the first of which was: Did the plaintiffs ever dedicate and set apart the real estate described in the complaint as a homestead, by living upon it with the intention so to dedicate it? and told the jury, if they answered this question in the negative, the answer would constitute their entire verdict, but if they found in the affirmative, they should then proceed to answer the other questions. *Held*, that such direction was proper, as a negative answer to this question was conclusive against a recovery, and that such directions are convenient in practice, and no abuse of discretion. *Broadus v. Nelson*, 16 *Cal.* 79.

76. Description of Land.—An instruction to the jury that they must take the grant and map together, and if they believe the land in

controversy within the grant, as explained by the map, they will find for the plaintiff: *Held*, to be correct. *Ferris v. Coover*, 10 *Cal.* 589.

77. Diverting Water.—"That defendant is not liable for any deficiency in plaintiff's ditch, unless he was diverting from Rabbit Creek more water than he was entitled to at the precise time that such deficiency existed" was held proper. (*Brown v. Smith*, 10 *Cal.* 508.) Also, where the Court instructed the jury that if they believed that defendant's ditch was so filled with tailings during the period of the alleged injury that it was incapable of directing the waters of the creek, the plaintiff cannot recover. *Id.*

78. Forceful Entry and Detainer.—The Court has no right to instruct the jury "that if they believed, upon the evidence, that defendants had possession of the premises when plaintiff went there to build his house, that defendants had a right to forcibly enter and tear down plaintiff's house and fence if they could do so without committing a breach of the peace." Such a charge is utterly opposed to well established principles of law. (*Brown v. Perry*, *Cal. Sup. Ct., Jan. T.* 1870.) It is error in the Court to instruct the jury that "the actual possession being admitted, the presumption is that it was peaceable, unless the contrary appear." *Warburton v. Doble*, *Cal. Sup. Ct., Oct. T.*, 1869.

79. Fraud.—It is error to instruct a jury, in a civil case of imputed fraud, that if they have a doubt of the guilt of the party charged, they must find in his favor. Issues of fact in civil cases are determined by a preponderance of testimony, and this rule applies as well to cases of fraud as to any other. (*Ford v. Chambers*, 19 *Cal.* 143.) It was error in the court below to refuse to instruct the jury that if they believed the receipt specified in the deed for \$3,000 was obtained by fraud, they were authorized to find for defendant. (*McDaniel v. Baca*, 2 *Cal.* 326.) In an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property shortly before his application, which property was not included in the schedule: *Held*, that it was error for the Court to instruct the jury, "that to find the charge of fraud sustained they must believe the deed made with intent to deceive creditors, and to have been actually delivered to the grantees; that proof of record was no delivery," etc. The fraud is as complete without the delivery as with it. (*Fisk v. His Creditors*, 12 *Cal.* 281.) Various points in relation to the proper charge in respect to a fraudulent intent in the transfer of goods

in a peculiar case determined, (*Walsh v. Kelly*, 42 *Barb.* 98; S.C., 27 *How. Pr.* 359.

80. Injunction.—In suit for damages for an entry upon mining claims, and for perpetual injunction, etc.: *Held*, that it was error for the Court below to charge the jury that if they believed no injury or damage was done by defendant to plaintiffs, they would find for defendants; that such charge was calculated to mislead, inasmuch as the law presumes damages from a trespass, and under the charge the jury might have decided the case upon this want of proof of plaintiff's damages, instead of absence of proof of their title. *Attwood v. Fricot*, 17 *Cal.* 37.

81. Libel.—In a charge to the jury in an action for libel, it was *held*, that where the Court expressed an opinion as to whether the publication was libelous or not, and also defined what in law constituted a libel, that such opinion was submitting the question to the jury, and was no ground for new trial. (*Graham on New Trials*, 426; *Cook on Def.* 171.) For the proper matter of a charge in an action for libel, *Fry v. Bennett*, 3 *Bosw.* 200, 243.

82. Right of Possession.—Where the defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. Such instruction does not imply that plaintiffs can recover, even if they do not establish, *prima facie*, a title. *Busenius v. Coffee*, 14 *Cal.* 91; *Pollock v. Cummings*, *Cal. Sup. Ct., Oct. T.*, 1869.

83. Slander of Title.—It was error for the Court to instruct the jury "that where a person injuriously slanders the title of another, malice is presumed." It was also error to instruct them that fraud could not be presumed, but may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature. *McDaniel v. Baca*, 4 *Cal.* 326.

84. Statute of Frauds.—Cases where courts below instructed the jury that the facts showed no valid sale of personal property, for want of such change of possession as the Statute of Frauds requires, and the Supreme Court sustained the instructions, *Ford v. Chambers*, 19 *Cal.* 143.

85. **Title to Land.**—In ejectment, where the title is of record and wholly documentary, the Court may declare the effect of the papers offered by plaintiff, and instruct the jury that plaintiff has made out his title, if they believe the land to be within the boundaries of a grant under which plaintiff claims. (*McGarvey v. Little*, 15 *Cal.* 27.) In ejectment, the Court having admitted in evidence, as sufficiently proven, the mesne conveyance through which plaintiff traced title, the defendants being mere trespassers, charged the jury "that the written evidence of title, together with the admissions of the parties, authorized them to find for the plaintiff, since the execution of the papers had been passed upon by the Court: *Held*, to be no objection to this instruction that it does not leave the execution and delivery of the conveyance to the jury; that the sufficiency of their execution was a matter addressed solely to the Court, and that—no question being raised during the trial as to their delivery, and no evidence being offered to rebut the presumption of delivery arising from their possession by plaintiff—the instruction amounted only to an announcement of law as to the effect of the conveyances and of the admissions of the defendants. *Stark v. Barrett*, 15 *Cal.* 373.

CONDUCT OF THE JURY.

86. After hearing the charge, the jury may either decide in court or retire for deliberation. (*Cal. Pr. Act*, § 166.) Should they retire for deliberation, the officer of the Court, having first been sworn not to communicate nor allow others to communicate with them, conducts them to the jury-room, where they deliberate upon and make up their verdict. They may take with them all papers, except depositions, which have been received as evidence in the cause, or notes of the testimony or other proceedings of the trial taken by themselves, or any of them, but none taken by any other person. *Cal. Pr. Act*, § 167; *Howland v. Willetts*, 5 *Seld.* 170; *Porter v. Mount*, 45 *Barb.* 422.

87. They may come into Court for information upon the testimony, in case of a disagreement between them,

or upon any point of law. (*Cal. Pr. Act*, § 168.) But after the jury retires, it is error to allow them to come into court and receive instructions in the absence of the parties or their counsel. *Cal. Pr. Act*, § 168; *Redman v. Yontz*, 5 *Cal.* 148.

88. The Judge may keep the jury together as long as in his judgment there is any reasonable prospect of their being able to agree. (*Green v. Telfair*, 11 *How. Pr.* 260.) But he has no right to threaten or intimidate them in order to affect their deliberations. *Green v. Telfair*, 11 *How. Pr.* 260.

89. It is the province of the jury to determine from the evidence of the issues of fact, and their decision is final. (*McCauley v. Weller*, 12 *Cal.* 500.) Having determined upon their verdict, they are brought into court by the officer, and through their foreman they declare the same. If it be a sealed verdict, it is read by the Clerk, so that parties may be distinctly informed of its purport. *Blum v. Pate*, 20 *Cal.* 69.

No. 1020.

Form of Verdict.

We, the undersigned jury, sworn in the case of
..... against, do find in favor of the
[plaintiff; or, if special, state what was found].

[DATE.]

[SIGNATURES.]

90. **Amendment of Verdict.**—The Court may amend the verdict of a jury, when it is defective in something merely formal, and which has no connection with the merits of the case, where the amendment in no respect changes the rights of the parties. *Perkins v. Wil-*

son, 3 *Cal.* 139; see *Truebody v. Jacobson*, 2 *Cal.* 269.) The right to correct does not depend upon the judgment, and the steps necessary for that purpose must be taken in the statutory time. (*Allen v. Hill*, 16 *Cal.* 113.) An informal or insufficient verdict may be corrected under the advice of the Court. (*Cal. Pr. Act*, § 172.) See, as to the power of correcting mere technical errors, (*Wells v. Cox*, 1 *Daly*, 515.) But error in substance cannot be corrected by motion. (*Brush v. Kohn*, 9 *Bosw.* 589.) If the Court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. *Ross v. Anstill*, 2 *Cal.* 183.

91. Chance Verdict.—A verdict to which the assent of any of the jurors was obtained by a resort to chances will be set aside; (see *Cal. Pr. Act*, § 193, Subd. 2; *Donner v. Palmer*, 23 *Cal.* 40;) such verdicts being regarded in the same light as gambling verdicts. (*Wilson v. Berryman*, 5 *Cal.* 44.) When jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the whole amount of those sums by the number of persons composing the jury, which result shall be their verdict, a verdict thus found is irregular, and will be set aside. (*Wilson v. Berryman*, 5 *Cal.* 44.) But if such means be adopted, without any being bound thereby, and afterwards the jury agree upon such sum, the Court will not disturb the verdict. (*Id.*) Such verdict is not a chance verdict, within the meaning of Subdivision 32 of § 19 of the California Practice Act; (*Boyce v. Cal. Stage Co.*, 25 *Cal.* 460;) but is vicious, and should be set aside, if the facts were proved by competent testimony. *Turner v. Tuolumne Co. Wat. Co.*, 25 *Cal.* 397.

92. Character and Form of Verdict.—When the party does not rely in his pleadings upon an estoppel, but himself opens the truth or falsehood of the facts which he claims that the other party is estopped to aver or deny, and makes the truth of these facts the very issue which the jury are called upon to try, the jury are bound to find according to the real truth of the facts proved before them. (*Anthony v. Brayton*, 7 *Rhode Island*, 52.) The terms and expressions in the pleading will not necessarily give character to or determine the effect or meaning of the verdict. (*McLaughlin v. Kelly*, 22 *Cal.* 211.) A recovery, if had, must be grounded upon the facts which are averred in the complaint, and not upon those which are denied. (*Gregory v. Haworth*, 25 *Cal.* 653.) The verdict must be confined to the matters put in issue by the pleadings. (*Benedict v. Bray*, 4 *Cal.* 251; *Truebody*

v. Jacobson, Id. 285.) A verdict need not be entitled at all. (*McGarrity v. Byington, 12 Cal.* 426.) The verdict of a jury in a chancery case is only advisory to the Chancellor or this Court; (*Still v. Saunders, 8 Cal.* 281;) and may be disregarded. *Goode v. Smith, 13 Cal.* 84.

93. Claim and Delivery.—In actions for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property. *Cal. Pr. Act, § 177.*

94. Conclusiveness of Verdict.—The finding of a jury, or of the court below acting as a jury, upon a question of fact, is final, and conclusive. (*Perry v. Cochran, 1 Cal.* 189; *Duff v. Fisher, 15 Id.* 380.) A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same fact or title; (*Kidd v. Laird, 15 Cal.* 161;) but the fact or title must be material or relevant. See, as to presumption in favor of correctness of verdict, not clearly designating its precise import, (*Carpenter v. Simmons, 28 How. Pr.* 12.) And court will intend that verdict settles every question of fact litigated upon the trial. (*Wolf v. Goodhue Fire Ins. Co., 43 Barb.* 400.) General rule maintained, that verdict of a jury is conclusive upon the question of fact submitted to them, if there be any evidence to support it. (*Miller v. Lockwood, 32 N.Y.* 293; *Hyatt v. Trustees of Rondout, 44 Barb.* 385; *Fleming v. Smith, 44 Barb.* 554; *Kavanagh v. Beckwith, 44 Barb.* 192; *Goodwin v. Kelly, 42 Barb.* 194; *Dexter v. Bevins, 42 Barb.* 573, 575; *People v. Townsend, 37 Barb.* 520; *Smith v. Tiffany, 36 Barb.* 23; *Best v. Starks, 24 How. Pr.* 58; *O'Hara v. Brophy, 24 How. Pr.* 379; *Sheldon v. Stryker, 42 Barb.* 284; *27 How. Pr.* 387; *Whitney v. Wells, 28 How. Pr.* 150; *Murphy v. Boker, 28 How. Pr.* 251; *Commissioners of Excise, etc., v. Backus, 29 How. Pr.* 33; *Cothran v. Collins, 29 How. Pr.* 155; *Decker v. Myers, 31 How. Pr.* 372; *Stewart v. Keteltas, 9 Bosw.* 261, 266; *Lewis v. Blake, 10 Bosw.* 198; *Rowe v. Smith, 10 Bosw.* 268; *Gilhooly v. New York and Savannah S. N. Co., 1 Daly, 197.*) A verdict is never conclusive upon immaterial or collateral

issues. (Bear River and Aub. Wat. and Min. Co., 15 *Cal.* 145.) See qualification of rule as regards verdict manifestly against evidence, *Suydam v. Grand Street and Newtown R.R. Co.*, 41 *Barb.* 375; 17 *Abb. Pr.* 304; *Delafield v. Union Ferry Co.*, 10 *Bosw.* 216; *Price v. Murray*, 10 *Bosw.* 243; *Deming v. Bailey*, 10 *Bosw.* 258; *Jacobson v. Belmont*, 7 *Bosw.* 14; *Robbins v. Hud. Riv. R.R.* 7 *Bosw.* 1; *Greer v. Mayor of New York*, 1 *Abb. Pr. (N.S.)* 206.

95. Directing Verdict.—The Practice Act confers express authority upon the courts below to direct a special verdict. (*Burritt v. Gibson*, 3 *Cal.* 396.) And the Court must determine what particular facts the jury shall find specially, and neither party has the right to dictate terms. (*American Co. v. Bradford*, 21 *Cal.* 260.) And where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings, and should be separately and distinctly stated. (*Phoenix Water Co. v. Fletcher*, 20 *Cal.* 482.) In all cases the Court may instruct the jury, if they render a general verdict, to find upon particular questions of facts, to be stated in writing. (*Cal. Pr. Act*, § 175.) Where there is no dispute as to facts, and the law upon these facts declares a transaction fraudulent, it is not a question for the jury. The Court in such case may direct the jury how to find, or set aside the verdict if they find to the contrary. *Cheney v. Palmer*, 6 *Cal.* 119.

96. Entry of Verdict.—Upon receiving a verdict, an entry shall be made by the Clerk in the minutes of the Court, specifying the time of trial, the names of the jurors and witnesses, and the verdict; and where special verdict is found, either the judgment rendered thereon or the order reserving it for argument or further consideration. (*Cal. Pr. Act*, § 78.) That will be treated as the verdict which the jury actually bring in, and the Court should direct it to be recorded as rendered. *Moody v. McDonald*, 4 *Cal.* 297.

97. Errors Cured.—A defective allegation of a fact may be cured by verdict, but not the absence of an allegation. (*Hentsch v. Porter*, 10 *Cal.* 555.) The failure to aver performance is cured by verdict. (*Happe v. Stout*, 1 *Cal.* 461.) So, in a verified complaint where a special demand is essential, the error of a general averment of demand is cured by verdict. (*Mills v. Barney*, 32 *Cal.* 240; *Jones v. Block*, 30 *Id.* 227.) After verdict, defects in substance in the declaration are cured, if the issue joined be such as necessarily required on

the trial proof of the facts defectively or imperfectly stated or omitted; and the Court will presume that the facts showing the right were proved. (*Stanley v. Whipple*, 2 *McLean*, 35; see *Garland v. Davis*, 4 *How. U.S.* 131, 145; *Brent v. Bk. of the Metropolis*, 1 *Pet.* 89; aff'd, 2 *Cranch C. Ct.* 530.) Where the complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by verdict. *People v. Rains*, 23 *Cal.* 127; see *Garner v. Marshall*, 9 *Cal.* 268.

98. Forcible Entry and Detainer.—In an action for a forcible and unlawful entry and detainer of a mine, against a corporation and C. and V., the jury returned a verdict of guilty as to C. and V., and not guilty as to the corporation: *Held*, that such verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants C. and V., and that the corporation did not participate in the trespass. (*Fremont v. Crippen*, 10 *Cal.* 211.) The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another, and such a verdict is conclusive against the possession of the corporation. (*Id.*) When a writ of restitution has been awarded in such a case, and the Sheriff refuses to execute the same, on the ground that the mine is in the possession of certain persons not parties to the suit, who claim to hold under the corporation, the Court will award a peremptory *mandamus* against the sheriff, and compel him to execute the writ. (*Id.*) There must be evidence tending to prove an actual exhibiton of force to retain possession, and of present ability and disposition to use it, to warrant a conviction of a forcible detainer. (*McMinn v. Bliss*, 31 *Cal.* 122.) For the purpose of determining whether an entry is forcible, all that transpires between the parties from the time of the coming of one until the going out of the other is to be taken into account. *Valencia v. Couch*, 32 *Cal.* 340.

99. General Verdict.—A general verdict is that by which a jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant. (*Cal. Pr. Act*, § 174.) In an action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. (*Cal. Pr. Act*, § 175.) A general verdict will include all parties who do not answer separately, or demand separate verdicts. (*Winans v. Christie*, 4 *Cal.* 70; *Ellis v. Jeans*, 7 *Id.* 409.) Its effect will be limited to such issues

as necessarily controlled the action of the jury. (*Id.*; *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 *Cal.* 145.) In an action to recover the possession of land, the following verdict, "We, the jury in this cause, find a verdict in favor of the plaintiff against the defendants, for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages:" *Held*, substantially a general verdict. (*Hutton v. Reed*, 25 *Cal.* 478; see *Leese v. Clark*, 28 *Cal.* 26.) General verdict entered on counts of which part are bad is erroneous. But if the good counts set forth a sufficient cause of action, it may stand. *Fry v. Bennett*, 28 *N.Y.* 324.

100. How Authenticated.—The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the Clerk. *Reynolds v. Harris*, 8 *Cal.* 618.

101. Informal Verdict.—Where the declaration in an action of *assumpsit* contained the following counts: 1, on a promissory note; 2, *indebitatus assumpsit* for the hire of chattels; 3, an account stated; 4, *quantum valebat* for the service of chattels; 5, work and labor, goods sold and delivered, and money lent and advanced; 6, money had and received; 7, an account stated; 8, a special agreement for the hire of chattels;—and the defendant pleaded: 1, the general issue; 2, Statute of Limitations; 3, payment;—and the jury found a verdict for "the defendant, upon the issue joined, as to the within note, of four hundred and fifty-six dollars, and the within account:" this verdict, although informal, was sufficient to authority to enter a general judgment for defendant. (*Downey v. Hicks*, 14 *How. U.S.* 240.) When the verdict returned by the jury is informal, it is the duty of the Court to explain to them its defects, and direct them to put it in proper form. *People v. Dick*, 34 *Cal.* 663.

102. Joint Verdict.—A joint verdict against answering and defaulting defendants is conclusive against all, when a separate verdict has not been demanded. (*Anderson v. Parker*, 6 *Cal.* 197; *Ellis v. Jeans*, 7 *Id.* 409.) And if no objection or exception is taken to the verdict on that ground in time to afford an opportunity to correct it, the defendants cannot afterwards object to the joint verdict and judgment. *Hicks v. Coleman*, 25 *Cal.* 122.

103. Mining Claims.—In an action to recover a quartz ledge, when defendants deny plaintiffs' title and ouster, and set up title in themselves to a part only in the ledge, a special verdict awarding de-

fendants that portion of the ledge they claim, without a general verdict if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs. (*Gonzales v. Leon*, 31 *Cal.* 98.) The words, "more or less," contained in a verdict, give all between the notices. *Id.*

104. Setting Aside Verdict.—A court may, of its own motion, set aside the verdict of a jury, when clearly and palpably against the evidence. (*Duff v. Fisher*, 15 *Cal.* 375.) A general objection to the form of a verdict, without any specification of particular defects, will not be considered. (*Mahoney v. Van Vinkle*, 21 *Cal.* 552.) A verdict obtained upon incompetent evidence may be set aside, but not if the evidence were admitted without objection. (*McCloud v. O'Neal*, 16 *Cal.* 392.) In such case, that which vitiates the verdict is the error of the Court in admitting the evidence. (*Id.*) But the admission of improper evidence is no ground for setting aside the verdict where no injury was done thereby to the party objecting. (*Priest v. Union Canal Co.*, 6 *Cal.* 170.) Where the law declares certain facts conclusive evidence of fraud, a verdict against such conclusion will be set aside; but where the facts are declared merely presumptive it is otherwise. (*Id.*) The amendment of 1862 to Section 193 of the California Practice Act, allowing the affidavits of jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trial made after its passage. (*Downer v. Palmer*, 23 *Cal.* 40.) Such affidavits are not allowed unless it be a chance verdict which is impeached. (*Turner v. Yuba Water and Mining Co.*, 25 *Cal.* 397; *Boyce v. Cal. Stage Co.*, 25 *Cal.* 460; for decisions before the amendments, see 1 *Cal.* 403; 5 *Cal.* 40; 4 *Id.* 102; 5 *Id.* 44; 4 *Id.* 259; *Cline v. Broy*, 1 *Oregon*, 89.) A verdict was set aside on the ground of misconduct on the part of the officer in charge. *Thomas v. Chapman*, 45 *Barb.* 98; see "*New Trial*."

105. Special Verdict.—A special verdict is that by which the jury finds the facts only, leaving the judgment to the Court. It shall present the conclusions of fact as established by the evidence, and not the evidence to prove them, and those conclusions of fact shall be so presented that nothing shall remain to the Court but to draw the conclusions of law. (*Cal. Pr. Act*, § 174.) In all cases other than for the recovery of money only, or specific real property, the Court may direct the jury to find a special verdict in writing upon all or any of the issues. (*Cal. Pr. Act*, § 174.) Where a special finding of facts shall be insufficient with the general verdict; the former shall control the latter, and

the Court shall give judgment accordingly. (*Cal. Pr. Act*, § 175.) When the jury are directed by the Court to find a general verdict, and, also, to make a special finding of facts, and a general verdict is returned in favor of one party, and the findings on the special issues are in favor of the other party, the Court should render judgment in accordance with the special findings, if they embrace *all* the issues raised in the pleadings; if not, then judgment should be rendered on the general verdict. *McDermott v. Higby*, 23 *Cal.* 489.

106 Special Verdict.—A special verdict must find the facts expressly and specially, and not generally or impliedly. (*Cal. Pr. Act*, § 174; *Breeze v. Doyle*, 19 *Cal.* 101.) And the findings must be distinct; (*Woodson v. McClure*, 17 *Cal.* 298;) and not equivocal. Such verdict settles the facts, and the Court by its judgment pronounces the conclusions of law upon the facts so found. (*Allen v. Hill*, 16 *Cal.* 113.) And if the party dissatisfied fails to move for a new trial, the verdict is conclusive on the facts. (*Garwood v. Simpson*, 8 *Cal.* 101; *Duff v. Fisher*, 15 *Id.* 380.) The Court having directed the jury to find a special verdict upon questions submitted in writing to their consideration, may withdraw any of such questions, and instruct them that they need not answer. This is purely a matter of discretion, over which the Court, on appeal, will not exercise control. *Taylor v. Ketchum*, 5 *Robt.* 507; *S.C.*, 35 *How. Pr.* 289.

107. Verdict by Stipulation.—A stipulation that a verdict should be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had actually rendered a verdict for the defendant, should be regarded in precisely the same light as a verdict, and be followed by the same legal results. *Suñol v. Hepburn*, 1 *Cal.* 258.

108. Verdict Sustained.—When the jury found the only issues involved in the controversy an exception to the verdict, that no verdict was formed upon the issue presented by the pleadings will not be sustained. (*Burritt v. Gibson*, 3 *Cal.* 396.) Where there are special and general counts in a declaration, and a demurrer is filed which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts, a verdict and judgment so obtained will not be set aside because the demurrer was undisposed of. (*Townsend v. Jemison*, 7 *How. U.S.* 706.) Objection cannot be taken on a writ of error that the verdict in a trial where there were several issues was that

the jury found the "issue" for the plaintiff. *Laber v. Cooper*, 7 *Wall. U.S.* 565.

109. Declaring Verdict.—The verdict being recorded, the jury are asked if such is their verdict, and their assent to the same, as expressed through their foreman, is conclusive upon all the jury. (*Blum v. Pate*, 20 *Cal.* 69.) With the assent of the jury to the verdict as recorded, their functions with respect to the case cease, and the trial is closed. (*Blum v. Pate*, 20 *Cal.* 69.) Upon the rendition of the verdict, the Court orders judgment to be entered up accordingly. As to fees of jurors in civil cases, see *Laws of Cal.* 1865–6, 272.

110. Fees and Compensation.—Where a person is summoned as a juror, and at the same time is subpoenaed by the United States as a witness, he is entitled to compensation for each service. (*Edwards v. Bond*, 5 *McLean*, 300.) Jurors living at a distance, and not receiving mileage at adjournments, are entitled to a *per diem* for those days *during* which the panel stands adjourned, as well as for those *to* which it stands adjourned. (*Parker v. Kempston*, 1 *Wall. jr. C. Ct.* 344.) Jurors in civil cases are entitled to compensation for the time they are in attendance on the Court, whether they are empaneled for the trial of cases or not. *Thornburgh v. Herman*, 1 *Nev.* 473.

PROCEEDINGS AFTER VERDICT.

111. Polling Jury.—In civil actions, in California, it is not a matter of right to have the jury polled before the verdict is recorded; it rests in the discretion of the Court to allow it. After it is recorded, it is never allowed. (*Blum v. Pate*, 20 *Cal.* 69.) In New York, the jury may be polled at the instance of either party. (7 *Johns.* 32; 3 *Cow.* 23; 2 *Wend.* 352; 3 *Johns.* 255; *Labor v. Coplin*, 4 *Comst.* 547.) So in Missouri. *Hubble v. Patterson*, 1 *Mo.* 392; *Rankin v. Harper*, 23 *Mo.* 579.

CHAPTER V.

TRIAL BY REFEREES.

1. A reference may be ordered, upon the agreement of the parties, filed with the Clerk, or entered in the minutes: *First*, To try any or all the issues in an action or proceeding, whether of fact or of law; and to report a finding and judgment thereon. *Second*, To ascertain a fact necessary to enable the Court to proceed and determine the case. *Cal. Pr. Act*, § 182; *N. Y. Code*, § 270; *Ohio Code*, § 281; *Laws of Oregon*, § 218; *Nevada*, § 182; *Wash. Tr.* § 222; *Idaho*, § 182; *Arizona*, § 184; 2 *Till. & Shear. Pr.* 516.

2. The consent of a party is necessary to an order of reference, and it must be in writing or entered on the minutes. (*Smith v. Pollock*, 2 *Cal.* 92; affirmed in *Benham v. Rowe*, 2 *Cal.* 261; and restricted in 4 *Id.* 7 to cases at common law.) The Court has no power, when either of the parties object, to order a reference, with directions to the referee to report a judgment. (*Grim v. Norris*, 19 *Cal.* 140; *Williams v. Benton*, 24 *Cal.* 424.) Consent may be given "by oral consent, in open court, entered on the minutes." (*Bates v. Visher*, 2 *Cal.* 355; *People v. McGinnis*, 1 *Park. Cr.* 387; *Keator v. Ulster Plk. Road Co.*, 7 *How. Pr.* 41; *Bloore v. Potter*, 9 *Wend.* 480; *Leacroft v. Fowler*, 7 *How. Pr.* 259.) In New York, it is held that an appearance before the referee, without objection, is a

waiver of a written consent, or, indeed, any consent; (*Renouil v. Harris*, 2 *Sandf.* 641; *Coombs v. Wyckoff*, 2 *Cain. R.* 157; *Greason v. Keteltas*, 17 *N.Y.* 498; 1 *Code Rep.* 125; *Andrews v. Elliot*, 5 *Ell. & Bl.* 502;) although the only positive decision on the subject is to the contrary. *Diddell v. Diddell*, 3 *Abb. Pr.* 167.

3. This section of the Statute does not apply to equity cases, as the Court may order a reference in equity cases without the consent of parties. (*Benham v. Rowe*, 2 *Cal.* 261; *Smith v. Rowe*, 4 *Cal.* 6; *Still v. Saunders*, 8 *Id.* 281; *Grim v. Norris*, 19 *Cal.* 140.) A stipulation to refer the whole matter is a waiver of any objection, that the motion for a new trial and to set aside the award, was not made within the Statute time. (*Heslep v. City of San Francisco*, 4 *Cal.* 1.) But stipulation must be in writing. (*Andrews v. Elliot*, 5 *Ell. & Bl.* 502.) But the whole issue in divorce cases cannot, even by stipulation of parties, be referred. (*Baker v. Baker*, 10 *Cal.* 527.) But in New York the practice is different; there actions for divorce are referable by consent. (*People v. McGinnis*, 1 *Park. Cr.* 387; *Anon.*, 3 *Code Rep.* 139; *Whale v. Whale*, 1 *Code R.* 115.) But the Court will not order a reference of such an action simply to take testimony. (*Whale v. Whale*, 1 *Code R.* 115.) Here again the rule differs, for in divorce cases in California the referee is simply a master to take testimony. *Baker v. Baker*, 10 *Cal.* 517.

WHEN A REFERENCE WILL BE ORDERED.

4. On a judgment upon a issue of law, if the taking of an account be necessary to enable the Court to complete the judgment, a reference may be ordered.

(*Cal. Pr. Act*, § 181; *Laws of Oregon*, § 219, Subd. 2; *Idaho*, § 181; *Arizona*, § 183; *Wash. Tr.* § 222.) An account is a statement of commercial or pecuniary transactions between parties, occurring at various times. (*Freeman v. Atlantic Mut. Ins. Co.*, 13 *Abb. Pr.* 124.) Bill of articles delivered at one time is not an account. (*Swift v. Wells*, 2 *How. Pr.* 79; *Miller v. Hooker*, 2 *How. Pr.* 171; *Stewart v. Elwell*, 3 *Code R.* 139.) Nor a single bill of lading containing items. (*Miller v. Hooker*, 2 *How. Pr.* 171.) Nor numerous items of damage. (*Dewey v. Field*, 13 *How. Pr.* 437; *McCullough v. Brodie*, *Id.* 346; *Sharp v. Mayor of N.Y.*, 9 *Abb. Pr.* 426; 18 *How. Pr.* 213.) Nor of articles lost on an action upon insurance policy. (*Freeman v. Atlantic etc.*, 13 *Abb. Pr.* 124; but to the contrary see *Lewis v. Irving Fire Ins. Co.*, 15 *Abb. Pr.* 303.) Nor claim for numerous articles under a single obligation. *Van Rensselaer v. Jewett*, 6 *Hill*, 373.

5. When the taking of an account is required, it is in the discretion of the Court to take an account, or to refer it to a commissioner or referee. (*Hidden v. Jordan*, 28 *Cal.* 301.) In an action at law, the necessity of taking a long account will not authorize the Court to refer the case without the consent of parties. (*Grim v. Norris*, 19 *Cal.* 140; *Seaman v. Mariani*, 1 *Id.* 336; *Freeman v. Atlantic Mut. Ins. Co.*, 13 *Abb. Pr.* 124; *Keeler v. Poughkeepsie Plk. Road Co.*, 10 *How. Pr.* 11; *Draper v. Day*, 11 *How. Pr.* 439; *Graham v. Goulding*, 7 *Id.* 260; *Whittaker v. Desfosse*, 7 *Bosw.* 678.) It cannot be ordered merely on the ground that if plaintiff recovers judgment such examination will become necessary. (*Cameron v. Freeman*, 10 *Abb. Pr.* 333; 18 *How. Pr.* 310; *Keeler v. Poughkeepsie, etc.*, 10 *How.*

Pr. 11; *Graham v. Goulding*, 7 *How. Pr.* 260; *Sheldon v. Weeks*, 7 *N.Y. Leg. Obs.* 57.) Though such account may be taken before main issues are tried by a jury, reserving those issues for such trial *Bowman v. Sheldon*, 1 *Duer*, 607; *Lewis v. Irving Fire Ins. Co.*, 15 *Abb. Pr.* 303.

6. In an action for balance of account; defense, payment by a promissory note; replication, that plaintiff was induced to receive the note by fraudulent representations: *Held*, that the case was not referable without written consent of both parties. (*Seaman v. Mariani*, 1 *Cal.* 336.) And in an action to dissolve a partnership, the Court may order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts, but it has no power, if objection is made, to order a reference of any other issue, or to direct referees to report a judgment. (*Williams v. Benton*, 24 *Cal.* 425.) And an averment in the answer that the accounts had been adjusted, and that the parties had "not taken any new contracts since," held not sufficient to prevent a reference. *Kennedy v. Shelton*, 1 *Hilt.* 546; 9 *Abb. Pr.* 157.

7. On an application for the protection of an attorney's lien, the Court has power to refer the question without consent. (*Ackerman v. Ackerman*, 14 *Abb. Pr.* 229; but compare *Fox v. Fox*, 24 *How. Pr.* 409.) Upon the failure of defendant to answer, in actions other than for the recovery of money only or damages, and the entry of defendant thereon, a reference may be ordered by the Court, in its discretion, or on application of the plaintiff, for the taking of an account, or the findings on a fact necessary to enable the Court to give judg-

ment or carry the judgment into effect. *Cal. Pr. Act*, § 150, Subd. 2; *Laws. of Nevada*, § 150, Subd 2.

ORDER OF REFERENCE—PRACTICE THEREON.

8. Affidavit Necessary.—The motion must be made on affidavit showing that issue is joined; (*Jansen v. Tappen*, 3 *Cow.* 34;) in law as well as fact. (*Dutcher v. Wilgus*, 2 *How. Pr.* 180.) But it need not state the place or time. (*Feeter v. Harter*, 7 *Cow.* 478; *Cleveland v. Strong*, 2 *Id.* 448.) Nor allege that no difficult questions of law are involved. (*Barber v. Cromwell*, 10 *How. Pr.* 351.) In this affidavit, state that an action is pending, that parties have been served and have answered, state nature of the action, to wit, for an accounting between partners, etc. etc., and that the accounts are lengthy and complicated, or any other facts as they exist.

9. Confession of Judgment.—A reference with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment roll in the case, and whether the same was filed in the Clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to a reference the question as to what amount, if any, is still unpaid in the judgment. *Solomon v. Maguire*, 29 *Cal.* 227.

10. Equity Cases.—In an equity case, where the trial of an issue of a fact involved requires the examination of a long account, the Court may order a reference, with directions to report upon the account or any issue of fact involved in the account. (*Williams v. Benton*, 24 *Cal.* 425.) Not only must there be an account, but it must be a *long* one; four items, nor yet *seven*, will not constitute such an account. *Parker v. Snell*, 10 *Wend.* 577; *Harris v. Mead*, 16 *Abb. Pr.* 257; *Smith v. Brown*, 3 *How. Pr.* 9.

11. Duties of Referees.—It is the duty of a referee to act upon the questions committed to him, and to report whatever he is required to report by the order under which he acts. (*Hihn v. Peck*, 30 *Cal.* 280.) Referees must keep as free from outside influence, or the influence of the parties, as jurors. (*Dorlon v. Lewis*, 9 *How. Pr.* 1; *Yale v. Gwinits*, 4 *Id.* 253.) And cannot be a witness in proceeding had before him. *Morss v. Morss*, 11 *Barb.* 510.

12. Motion, by whom Made.—It must be made by the party himself, or must state a sufficient excuse for his not doing so. (Wood *v.* Crowner, 4 *Hill*, 548; Little *v.* Bigelow, 2 *How. Pr.* 164; Ross *v.* Beecher, *Id.* 157; Mesick *v.* Smith, *Id.* 7; 5 *Hill*, 548.) And contain the names of the proposed referees. 1 *Caines' R.* 7, 149.

13. Motion, when Made.—The Court may order a reference upon its own motion. (*Cal. Pr. Act*, § 183; *N.Y. Code*, § 271; Van Zant *v.* Cobb, 10 *How. Pr.* 348; Barrow *v.* Sanford, 6 *Abb. Pr.* 320; 14 *How. Pr.* 443.) The time within which a notice of a motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, is regulated by Section 195; though either party may move, but not until issue is fully joined between all the parties. (Jansen *v.* Tappen, 3 *Cow.* 34; Dutcher *v.* Wilgus, 2 *How. Pr.* 180.) Nor while an issue of law remains undecided, which, if decided in a particular way, would dispose of all the issues of fact. (Jansen *v.* Tappen, 3 *Cow.* 34.) In short, it ought not to be made till the cause is ready for trial, though it may be made immediately upon joinder of issue, without waiting for a possible amendment of course by the adverse party. (Enos *v.* Thomas, 4 *How. Pr.* 290.) And either party may have order of reference revoked or reconsidered, if such amendment be made. (Beardsley *v.* Stover, 7 *How. Pr.* 294.) It ought to be made before notice of trial. Fish *v.* Wright, 5 *Cal.* 269.

14. Motion Opposed.—When the motion is opposed, on the ground that difficult questions of law are involved, an affidavit to that effect should be submitted, showing what questions are involved. (2 *Johns. Ca.* 403; 2 *Cai.* 251; 2 *Johns. Rep.* 374; Dewey *v.* Field, 13 *How. Pr.* 437; Salisbury *v.* Scott, 6 *Johns.* 329; overruling in effect Law *v.* Hallett, 3 *Cai.* 82; Lusher *v.* Walton, 1 *Cai.* 149; Barber *v.* Cromwell, 10 *How. Pr.* 351.) And questions of law must be clearly stated. (6 *Johns. Rep.* 329; 5 *Cow.* 423.) It is not a sufficient objection to a motion for reference to show that the action was in a previous trial left to a jury. (Brown *v.* Bradshaw, 1 *Duer*, 635; 8 *How. Pr.* 176.) An offer to admit upon the trial the items of an account upon stipulation will defeat the motion. Mullin *v.* Kelly, 3 *How. Pr.* 12.

15. Notice of Motion.—In general, a notice of motion is necessary, though the Court may upon its own motion order a reference on the hearing, without any formal motion or previous notice. Kelly *v.* Searing, 4 *Abb. Pr.* 354.

16. Number of Referees.—The number of referees shall not exceed three. (*Cal. Pr. Act*, § 184; *N.Y. Code*, § 273; *Laws of Oregon*, § 220; *Wash. Terr.* § 224; *Nevada*, § 184; *Idaho*, § 186; *Arizona*, § 186; *Rathbone v. Lownsbury*, 2 *Wend.* 595.) Or reference may be had to the court commissioner of the county where the cause is pending. (*Cal. Pr. Act*, § 184.) Must be residents of the county in which the action is triable. (*Id.*; *Chubb v. Berry*, 7 *Wend.* 483; *Sherwood v. Tremper*, 11 *Johns.* 406.) And be parties agreed upon by the parties to the action, or, on failure to agree, be appointed by the Court or Judge. (*Cal. Pr. Act*, § 184; *N.Y. Code*, § 273.) Where there are three referees or three arbitrators, all shall meet, but two of them may do any act which might be done by all. (*Cal. Pr. Act*, § 529; *McInroy v. Benedict*, 11 *Johns.* 402; *Harris v. Norton*, 7 *Wend.* 534; see *Jackson v. Ives*, 22 *Id.* 637.) The Court, by consent, may appoint a single referee. *Cal. Pr. Act*, § 309.

17. Objections to Referees.—Objections may be taken to referees in like manner as challenges to jurors for cause. (*Cal. Pr. Act*, 186; *Laws of Oregon*, § 222; *Nevada*, § 186; *Idaho*, 188; *Arizona*, § 187; see *Ante*, "Qualifications of Jurors," p. 435.) And objections so taken may be heard and disposed of by the Court; affidavits may be read, and any person examined as a witness in reference to such objections. (*Cal. Pr. Act*, § 186; *Arizona*, § 188.) The fact that the referee, in proceedings supplementary to execution, was the clerk of the attaching creditor, is not any considerable evidence of fraud. (*Adams v. Hackett*, 7 *Cal.* 187.) The statute concerning references does not require that referees should be sworn. (*Sloan v. Smith*, 3 *Cal.* 406.) In New York and Ohio it is otherwise (3 *R.S.* (5 *Ed.*) 667), but by proceeding on the hearing without objection the point is waived. *Ohio Code*, § 288; *Keator v. Ulster etc. Plank Road Co.*, 7 *How. Pr.* 41.

18. Order of Court Necessary.—An order of Court is necessary to constitute a reference under the Code, and no reference would be good as such without an order; (*Heslep v. City of San Francisco*, 4 *Cal.* 2; *Scudder v. Snow*, 29 *How. Pr.* 95; *Bonnier v. McPhail*, 31 *Barb.* 106;) where an infant is a party. (*Litchfield v. Burwell*, 5 *How. Pr.* 341.) But in other cases the absence of an order is waived by appearing before the referee in pursuance of a stipulation. (*Whalen v. Supervisors of Albany*, 6 *How. Pr.* 278.) A reference or arbitration, in which there is no order of Court or agreement filed with the

Clerk or entered on the minutes, is a withdrawal of the case from the jurisdiction of the Court. (*Heslep v. City of San Francisco*, 4 *Cal.* 1.) The order must conform to the stipulations. (*Haner v. Bliss*, 7 *How. Pr.* 246.) And cannot go beyond the pleadings of the parties. (*Branger v. Chevalier*, 9 *Cal.* 353.) If the order of reference fails to direct a return of the evidence, the party objecting to the report must see that such testimony as he relies on is properly certified. *Goodrich v. Marysville*, 5 *Cal.* 430.

19. Order without Consent.—But the Court may order a reference without the consent of parties, upon its own motion, or upon application of either party: *First*, When the trial of an issue of fact requires the examination of a long account on either side, etc. *Second*, When the taking of an account is necessary for the information of the Court, etc. *Third*, When a question of fact other than upon the pleadings arises, upon motion or otherwise, etc. *Fourth*, When necessary for the information of the Court on a special proceeding. *Cal. Pr. Act*, § 183; *Ohio Code*, § 282; *Nevada*, § 183; *N.Y. Code*, § 271; *Laws of Oregon*, § 219; *Idaho*, § 184; *Arizona*, § 185; *Wash. Terr.* § 223; *Till. & Shear. Pr.* 518.

20. Partition, Action of.—The appointment of referees in actions for partition is governed by the general provisions of the Practice Act, and can only be made upon the agreement of all the parties, except in cases falling within the provisions of Section one hundred and eighty-three of the Act. (*Hastings v. Cunningham*, 35 *Cal.* 549.) It is erroneous for the Court to order a reference for the purpose of trying all the issues in an action for partition in which there is a party whose name is unknown, and whose consent cannot therefore be procured, and all proceedings thereon must fall. *Hastings v. Cunningham*, 35 *Cal.* 549.

21. Power of Referees.—Under a reference to try issues and report a judgment, the referee can exercise all the powers of a judge, in relation to the trial of a cause referred to him. (*Plant v. Fleming*, 20 *Cal.* 92; *Woodruff v. Dickie*, 32 *How. Pr.* 164.) But the order must be entered to confer such power fully. (*Bonner v. McPhail*, 31 *Barb.* 106.) A court commissioner has no jurisdiction to hear a motion to make an order in reference to the dissolution of an injunction, unless the motion is referred to him by the Court. (*Storm v. Bunker Hill Co.*, 28 *Cal.* 497.) Referees may grant adjournments; (*N.Y. Code*, §§ 272, 421; *Kelly v. Israel*, 11 *Paige*, 147; *Forrest v.*

Forrest, 3 *Bosw.* 650; *Cooley v. Huntington*, 16 *Abb. Pr.* 384;) or any referee may administer oaths. *N.Y. Code*, § 421; 3 *R.S.* (5 *Ed.*) 667; 2 *Id.* 384; *Security Fire Ins. Co. v. Martin*, 15 *Abb. Pr.* 479.

22. Power and Authority.—Referees have no power to allow pleadings to be amended after a case has been submitted to them. (*De la Riva v. Berreyesa*, 2 *Cal.* 195.) It is directly otherwise in the New York practice. (See *N.Y. Code*, § 272; superseding *Billings v. Baker*, 6 *Abb. Pr.* 213.) Whether they have power, even in New York, to allow a new cause of action or defense to be set up by way of amendment, is as yet unsettled; in the following cases they have not. (*Union Bank v. Mott*, 10 *Abb. Pr.* 372; see *Woodruff v. Hurson*, 32 *Barb.* 557; *Woodruff v. Dickie*, 31 *How. Pr.* 164; *Everett v. Vendreyes*, 19 *N.Y.* 539.) But the latest decisions hold that they have. (*Van Ness v. Bush*, 14 *Abb. Pr.* 33; 22 *How. Pr.* 481; *Dunnigan v. Crummey*, 44 *Barb.* 528; *Secor v. Law*, 9 *Bosw.* 163.) A referee cannot delegate his authority, nor try a cause by deputy. (*Shultz v. Whitney*, 9 *Abb. Pr.* 71; 17 *How. Pr.* 471; *Heyer v. Deaves*, 2 *Johns. Ch.* 154.) A referee has no power to order a discovery of books and papers, without a special authority from the Court. (*Fraser v. Phelps*, 3 *Sandf.* 741.) But such authority may be conferred. 4 *Sandf.* 682; *Henna v. Dunn*, 6 *Madd.* 340.

23. Qualifications.—The qualifications necessary for referees are the same as those necessary for jurors. *Cal. Pr. Act*, § 185; see *Ante*, "Qualifications of Jurors," p 425.

24. Questions of Law.—The Code of New York, Section 271, provides that a reference cannot be enforced where difficult questions of law are involved. For examples cited, (*Ives v. Vandewater*, 1 *How. Pr.* 168; *Adams v. Bayles*, 2 *Johns.* 374; *Low v. Hallett*, 3 *Cal.* 82; *Codwise v. Hacker*, 2 *Id.* 251; *Shaw v. Ayrs*, 4 *Cow.* 52; *Anon.*, 5 *Cow.* 423.) The California Statutes are silent upon this point.

25. Torts.—Actions of 'tort, *e.g.*, upon a fraud, are referable with actions on contract, but not unless they involve examination of a long account. *Sheldon v. Wood*, 5 *Sandf.* 739; *Atocha v. Garcia*, 15 *Abb. Pr.* 303; 24 *How. Pr.* 186; to the contrary are *Dewey v. Field*, 13 *How. Pr.* 437; *Sharp v. Mayor of N.Y.*, 9 *Abb. Pr.* 426; *Freeman v. Atlan. Mut. Ins. Co.*, 13 *Abb. Pr.* 124.

26. Title.—References may be ordered to examine title—*e.g.*, in

action for specific performance—but not, however, before judgment, if any other question than that of title be in dispute; (*Blyth v. Elmhirst*, 1 *Ves. & B.* 1; *Paton v. Rogers*, *Id.* 351; *Morgan v. Shaw*, 2 *Merw.* 138; *Portman v. Mill*, 2 *Russ.* 570; *Gordon v. Ball*, 1 *Sim. & Stu.* 178;) unless all other questions are frivolous. (*Wood v. Macha*, 5 *Hare*, 158; *Boyes v. Liddell*, 1 *You. and Coll. Ch.* 133; *Boehm v. Wood*, 1 *Jac. & W.* 419; *Withy v. Cottle*, *Turn. & Russ.* 78.) As to what order of reference may contain on examination of title, see (*Bennett v. Rees*, 1 *Keen.* 405; *Anon.*, 3 *Madd.* 495; *Hyde v. Wroughton*, *Id.* 279; *Jennings v. Hopton*, 1 *Id.* 211; overruling *Gibson v. Clark*, 2 *Ves. & B.* 103; and compare *Lubin v. Lightbody*, 8 *Price*, 606; and see *Birch v. Haynes*, 2 *Meriv.* 444.) And, after some conflict of decisions, it appears to be settled that the order may contain a direction that referee may ascertain not only whether there is a good title, but when such title was perfected. *Bennett v. Rees*, 1 *Keen.* 405; *Hyde v. Wroughton*, 3 *Madd.* 279.

CONDUCT OF THE TRIAL.

27. A trial before referees should be conducted in the same manner as before a court. (*Goodrich v. Marysville*, 5 *Cal.* 430; *Phelps v. Peabody*, 7 *Id.* 50.) And the evidence should be embodied in a bill of exceptions, and certified by the referee. (*Goodrich v. City of Marysville*, 5 *Cal.* 430.) Where a reference is had to take an account, it is within the discretion of the referee to open the case, after it is once closed, for the purpose of receiving additional testimony. (*Marziou v. Pioche*, 10 *Cal.* 545; *Delafield v. De Grauw*, 9 *Bosw.* 1; *Duguid v. Ogilvie*, 3 *E. D. Smith*, 527; *Fielden v. Lahens*, 9 *Bosw.* 436; *Cleaveland v. Hunter*, 1 *Wend.* 104; *Thomas v. Fleury*, 26 *N.Y.* 26; *Pearson v. Fiske*, 2 *Hilt*, 146; 7 *Abb. Pr.* 419; *Schermerhorn v. Devlin*, 1 *Code Rep.* 28; *Trimble v. Stilwell*, 4 *E. D. Smith*, 512.) Even after they have announced their decision. (*Ayrault v. Sackett*, 17 *How. Pr.* 507; affirming *Id.* 461; 9 *Abb. Pr.* 154.) Though not after they have

signed their report and given notice thereof to either party. (*Shearman v. Justice*, 22 *How. Pr.* 241.) Nor after it has been filed. *Niles v. Price*, 23 *How Pr.* 473.

28. Where a referee admits the testimony of a witness against the objection of defendant, such testimony cannot afterwards be thrown out, without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony. (*Monson v. Cooke*, 5 *Cal.* 436; *Meyers v. Betts*, 5 *Denio*, 81; *Clussman v. Merkel*, 3 *Bosw.* 402. *Allen v. Way*, 7 *Barb.* 585; *Johnson v. McIntosh*, 31 *Id.* 267.) Unless no possible evidence would be admissible upon the point. (*Brown v. Colie*, 1 *E. D. Smith*, 265.) Or, unless proper warning be given to the parties, at the time it is received, that it will be stricken out unless other evidence necessary to make it valid is furnished. *Brooks v. Christopher*, 5 *Duer*, 216.

29. Hearsay and irrelevant testimony should be excluded by referees. (*De la Riva v. Berreyesa*, 2 *Cal.* 195.) On reference to take proofs and report, with his opinions thereon, referee has no power to reject evidence tendered. (*Scott v. Williams*, 23 *How. Pr.* 393; 14 *Abb. Pr.* 70.) Items barred by the Statute of Limitations, if objected to, should be excluded. *De la Riva v. Berreyesa*, 2 *Cal.* 195.

FINDINGS OF REFEREE.

30. The report of a referee should separately state the facts found and the conclusions of law thereon. (*Lambert v. Smith*, 3 *Cal.* 408; *Hihn v. Peck*, 30 *Cal.* 280; *Roberts v. Carter*, 28 *Barb.* 462; 17 *How. Pr.* 524; *Rogers v. Beard*, 20 *Id.* 282; *Hulce v. Sherman*, 13 *Id.*

411; *Yorks v. Peck*, 14 *Id.* 416; *Church v. Erben*, 4 *Sandf.* 691; *Snook v. Fries*, 19 *Barb.* 313; *Tilman v. Keane*, 1 *Abb. Pr. (N.S.)* 23; *Wright v. Sanders*, 28 *How. Pr.* 395; *Niles v. Battershall*, 27 *How. Pr.* 381; 18 *Abb. Pr.* 161.) Under a reference upon all the issues, the report must pass upon them all; (*Solomon v. Maguire*, 29 *Cal.* 227; *Rogers v. Beard*, 20 *How. Pr.* 282; *Van Stenbergh v. Hoffman*, 6 *How. Pr.* 492;) except those upon which no evidence is offered. (*Ingraham v. Gilbert*, 20 *Barb.* 151; *Patterson v. Graves*, 11 *How. Pr.* 91.) Everything necessary to support the judgment must be inserted in the statement of facts. (*Tomlinson v. Mayor of N.Y.*, 23 *How. Pr.* 452; *Hickok v. Bliss*, 34 *Barb.* 321.) Nothing must be left to inference, though a finding of fact may be interpreted by a finding of law. *Smith v. Devlin*, 23 *N.Y.* 363.

31. The decision of a referee stands on the same footing as that of a judge, or the verdict of a jury, and, though unsatisfactory, will be conclusive on a question of fact, if there is any evidence to support it. (*Knowles v. Joost*, 13 *Cal.* 620; *Muller v. Boggs*, 25 *Id.* 179; *Peck v. Vandenberg*, 30 *Id.* 11; *Metcalf v. Mattison*, 32 *N.Y.* 464; *Woodruff v. McGrath*, *Id.* 255; *Ball v. Loomis*, 29 *N.Y.* 412; *Kerr v. McGuire*, 28 *N.Y.* 446; 28 *How. Pr.* 27; *Merrill v. Grinnell*, 30 *N.Y.* 594; *Doty v. Carolus*, 31 *N.Y.* 547; *McMahon v. Allen*, 32 *How. Pr.* 313; *Graham v. Chrystal*, 32 *How. Pr.* 287; *Monell v. Marshall*, 25 *How. Pr.* 425; *Colwell v. Lawrence*, 24 *How. Pr.* 324; *Eschbaugh v. Syracuse Distil. Co.*, 27 *How. Pr.* 125; *Cromwell v. Benjamin*, 41 *Barb.* 558; *Fitch v. Carpenter*, 43 *Barb.* 40; *Smith v. McCluskey*, 46 *Barb.* 610; *Hoagland v. Wright*, 7 *Bosw.* 394; *Platt v. Thorn*, 8 *Bosw.* 574; *Morris v. Second*

Av. R.R. Co., *Id.* 679.) But not so as to conclusions of fact drawn from the pleadings alone. *Simmons v. Sisson*, 26 *N.Y.* 264.

32. When the order of a reference requires the referee to try the issues and report his finding thereon, the referee may make a general finding upon the facts put in issue, stating the facts according to their legal effect. (*Hihn v. Peck*, 30 *Cal.* 280.) The findings of a referee are conclusive as to the facts, on conflicting evidence. (*Gunter v. Sanchez*, 1 *Cal.* 45; *Walton v. Minturn*, *Id.* 362; *Goodrich v. City of Marysville*, 5 *Id.* 430; *Ritchie v. Bradshaw*, 5 *Id.* 228; *Knowles v. Joost*, 13 *Id.* 620; *Keeler v. Sutrick*, 22 *Id.* 471; *Muller v. Boggs*, 25 *Id.* 179; *Peck v. Vanderberg*, 30 *Id.* 11; *Brainerd v. Dunning*, 32 *N.Y.* 311; *Niles v. Price*, 23 *How. Pr.* 473; *Richardson v. Dugan*, 8 *Bosw.* 207; *Hoyt v. Hoyt*, 8 *Bosw.* 511; *Clark v. Acosta*, 9 *Bosw.* 158; *Secor v. Law*, 9 *Id.* 163.) The report of a referee and the award of an arbitrator are in all essentials the same. (*Headley v. Reed*, 2 *Cal.* 322; *Tyson v. Wells*, *Id.* 122; *Grayson v. Guild*, 4 *Id.* 122.) The findings of facts by a referee, and no statement on motion for a new trial, are presumed to be based on sufficient evidence, where no statement on motion for a new trial appears in the transcript. *Donahue v. Cromartie*, 21 *Cal.* 80.

*No. 1021.**Report of Referee.*

[TITLE.]

To the Court:

Pursuant to an order of this Court in this action, made on the day of, I, the undersigned, court commissioner [*or referee*], report:

I. That I have been attended by the attorneys for the several parties who appeared in this action [*name who appeared for plaintiff and who for defendant*], and I proceeded to a hearing of the matter so referred. I further report that on such hearing the books, deed papers, and vouchers of the said [partnership] have been produced before me, and both parties have rendered their respective accounts, which are hereto annexed, and marked "Schedule A."

II. That I examined said concerning the transactions [*state what*], and adjusted a mutual account between and, making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed, marked "Schedule B."

III. That said owes, etc. [*state facts.*]

IV. That the balance shown by said "Schedule B." [*state its apportionment.*]

[SIGNATURE.]

[DATE.]

33. Decree upon Report.—In a suit in chancery, it is perfectly competent for the Judge who tried the cause, after exceptions have been

filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts, and render a decree in the cause. *McHenry v. Moore*, 5 *Cal.* 90.

34. Exceptions to Report.—Exceptions must be taken during the progress of the trial to the rulings of the referee on the exclusion of proper or the admission of improper evidence, as in other cases at law. (*Cal. Pr. Act*, § 187; *Phelps v. Peabody*, 7 *Cal.* 50; *Branger v. Chevalier*, 9 *Cal.* 353; *Belmont v. Smith*, 1 *Duer*, 675.) Exceptions must be specific, not general. *Pearson v. Knapp*, 1 *Myl. & K.* 312; *Ward v. Fitzhugh*, 7 *Sim.* 42; *Compertz v. Best*, 1 *You. & C. Ex.* 114; but see *Woods v. Woods*, 10 *Sim.* 197; *Moore v. Langford*, 6 *Sim.* 323; *Cullen v. Dean of Kildare*, 2 *Irish Eq.* 133; *Stocken v. Dawson*, 2 *Phil.* 141.

35. Exceptions must be Taken.—If there be no exceptions embodied in the report, showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions being not disclosed, the Court cannot disturb the report, and an order granting a new trial will be reversed. (*Tyson v. Wells*, 2 *Cal.* 122; *Butte Co. v. Morgan*, 19 *Cal.* 609.) When a case is referred to a referee, under the Statute, to hear and determine the issues of law and of fact, and report the same to the Court, and he makes his report, wherein no errors of law or of fact occur, and no exceptions are taken, the court below should not set aside the report and grant a new trial. *Grayson v. Guild*, 4 *Cal.* 125.

36. Exceptions, how Taken.—Errors in the report must be taken advantage of by written objections to entering judgment on it, or by motion for a new trial. (*Porter v. Barling*, 2 *Cal.* 72.) Exceptions must specifically state the points objected to. *Appeal of Brooks v. Joseph*, 32 *Cal.* 559; *Newell v. Doty*, 33 *N.P.* 83; *Graham v. Chrystal*, 1 *Abb. Pr. (N.S.)* 121.

37. Report.—The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share. (*Cal. Pr. Act*, § 277.) Referee has no power to alter his report when made. (*Niles v. Price*, 23 *How. Pr.* 473; *Nelson v. Ingersoll*, 27 *How. Pr.* 1.) Report of referees to be made in writing within ten days. (*Cal. Pr. Act*, § 187; *Laws of Oregon*, § 225; *Nevada*, § 187; *Idaho*, 190; *Arizona*, § 189; *Wash. Terr.* § 230.)

Held, merely directory. A failure to file within the time will not invalidate the report or judgment thereon. (*Keller v. Rubrick*, 22 *Cal.* 471.) In New York, within sixty days is allowed. (*N.Y. Code*, § 273.) A report not made immediately after the close of the testimony is deemed as excepted to. *Cal. Pr. Act*, § 191; *Headley v. Reed*, 2 *Cal.* 322.

38. Report should State.—The report of a referee, like the finding of a court, should state the facts found and the conclusions of law. Without this the parties would be remediless, and their rights concluded in many cases by the arbitrary decision of a referee. (*Lambert v. Smith*, 3 *Cal.* 409.) A referee has no right to bring in and file an amended report, and the case must be reviewed with reference to the original report. (*Headley v. Reed*, 2 *Cal.* 324.) A reference, with directions “*to hear and determine* all the issues” in a case, does not require the referee to *report* them all. It is answered by reporting the sum due after hearing all the issues. *Heckers v. Fowler*, 2 *Wallace U.S.* 123.

SETTING ASIDE REPORT OF REFEREE.

39. Error must be Apparent.—The report of a referee cannot be attacked, except for error or mistake of law, apparent on its face, or by motion for new trial, upon exceptions taken at the trial, or the evidence certified. (*Goodrich v. City of Marysville*, 5 *Cal.* 430.) And the party objecting must see that such testimony as he relies on is properly certified. (*Id.*) The decision can only be set aside for fraud or gross error in law. (*Headley v. Reed*, 2 *Cal.* 322; *Mead v. Bunn*, 32 *N.Y.* 275.) The error complained of, whether of law or fact, must appear on the face of the award or report. (*Tyson v. Wells*, 2 *Cal.* 122.) For error in the report of a referee, the same may be set aside, and a new reference ordered. *Hidden v. Jordan*, 32 *Cal.* 397.

40. Grounds of Objection.—A court can interfere and set aside the report of a referee upon the same ground as it will proceed to set aside the verdict of a jury. (*McHenry v. Moore*, 5 *Cal.* 90; *Dorlon v. Lewis*, 9 *How. Pr.* 1; *Roosa v. Saugerties Turnpike Co.*, 12 *How. Pr.* 297.) The report of a referee upon the whole issues cannot be set aside on the mere ground that the conclusions of law drawn by them from the facts (*Dana v. Howe*, 13 *N.Y.* 306), or that the conclusions of fact drawn from the evidence, are erroneous. When the alleged error consists in the final conclusion of law or fact drawn from

the testimony, and the evidence is certified to the Court by the referee, the proper course is to move to set aside the report, and for a new trial. (*Branger v. Chevalier*, 9 *Cal.* 353.) If a report does not pass upon all the issues referred, it should be set aside; (*Pratt v. Stiles*, 9 *Abb. Pr.* 150; 17 *How. Pr.* 211;) and so should a report which does not find the issues of law and fact separately. *Hulce v. Sherman*, 13 *How. Pr.* 511; *Church v. Erben*, 4 *Sandf.* 691.

41. Insufficient Grounds.—It is error for the Court to set aside the report of a referee, upon an examination of testimony which was not properly before it. (*Goodrich v. Marysville*, 5 *Cal.* 430.) The Court will not disturb the award of an arbitrator or report of a referee unless the error complained of, whether of law or fact, appear on the face of the award or report. (*Tyson v. Wells*, 2 *Cal.* 122.) The defect of a plea, after submission to a referee, though it be bad on demurrer, is not sufficient reason to set aside the report. (*Ritchie v. Davis*, 5 *Cal.* 453.) The decision of a referee upon a question of fact will not be set aside where the evidence is conflicting. (*Brady v. Brown*, 20 *Cal.* 520.) Where there is a large mass of contradictory evidence reported, it will be presumed that the Court weighed the evidence properly in setting aside the finding of the facts by the referee. (*McHenry v. Moore*, 5 *Cal.* 90.) It would be gross abuse of discretion for a court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the Judge. (*Goodrich v. Marysville*, 5 *Cal.* 430.) Time within which notice of motion must be filed to set aside report. *Cal. Pr. Act*, § 195.

42. Motion to Set Aside.—The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, depends on the character of the reference. If it be special, the report has the effect of a special verdict; if general, it stands as the decision of the Court, and judgment may be entered thereon, exceptions taken and reviewed, as if action had been tried by the Court. (*Peabody v. Phelps*, 9 *Cal.* 213.) The time shall date from the filing of the report, or the rendition of the judgment. (*Peabody v. Phelps*, 9 *Cal.* 213.) Failure to appear and prosecute a motion to set aside the report of a referee, and for new trial, is an abandonment of the motion. *Mahoney v. Wilson*, 15 *Cal.* 43; *Frank v. Doane*, *Id.* 303; *Green v. Doane*, *Id.* 304.

43. Power of Court.—A court has power to set aside the

report of a referee, and grant a new trial, on the ground that the evidence before the referee did not justify his decision. (See *Cal. Pr. Act*, § 278; *Cappe v. Brizziola*, 19 *Cal.* 607.) But exceptions to the ruling of the referees must have been taken at the trial. (*Cal. Pr. Act*, § 187.) And the rule of law by which he arrived at his conclusions must be disclosed. (*Tyson v. Wells*, 2 *Cal.* 122; *Grayson v. Guild*, 4 *Id.* 122; but see *Butte Co. v. Morgan*, 19 *Id.* 609.) If the referee reports the facts upon all the issues, but draws an erroneous conclusion of law from the facts found, the Court, before a judgment is entered, may set aside the conclusions of law, and direct a proper judgment to be entered. *Calderwood v. Peyser*, 31 *Cal.* 333; *Scott v. Pilkington*, 15 *Abb. Pr.* 280; *Merritt v. Millard*, 10 *Bosw.* 309; *Newman v. Lebeaume*, 9 *Mo.* 29.

JUDGMENT ON REPORT.

44. Duty of Court.—A reference is a substitution for a jury, and a judgment should be had on the report as upon a verdict, and a motion to set aside the report is necessary, before the appellate court can be required to examine the report and set it aside. (*Gunter v. Sanchez*, 1 *Cal.* 48.) So with the report of a referee, which will not be set aside upon an appeal from an order refusing to grant a new trial. (*Ritchie v. Bradshaw*, 5 *Cal.* 229.) If the report of a referee under the Statute contain sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with it. (*Headley v. Reed*, 2 *Cal.* 322.) A *mandamus* lies to compel the judge of a district court to enter judgment on the report of a referee. *Russel v. Elliot*, 2 *Cal.* 246.

45. Grounds for Appeal.—An order overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference, may be renewed on an appeal from a final judgment. (*Peck v. Vandenberg*, 30 *Cal.* 11.) When a report of a referee has been erroneously set aside, and a new trial granted, from which action the plaintiff appeals, the Supreme Court will correct both errors at the same time, in a chancery case. (*Grayson v. Guild*, 4 *Cal.* 125.) If the commissioner to whom a case has been referred to take an account commits an error at the threshold which unsettles the account, the Court is not bound to go over the account and correct the error, but may set aside the report and again refer the case. *Hidden v. Jordan*, 32 *Cal.* 397.

46. Insufficient Grounds for Appeal.—The Supreme Court will not review a judgment entered on the report of a referee, if no objection was made to it in the court below. (*Porter v. Barling*, 2 *Cal.* 72.) So, where the testimony is conflicting, the Supreme Court will not disturb the findings. (*Muller v. Boggs*, 25 *Cal.* 179.) Nor will it review the findings to ascertain whether they are contrary to the evidence. (*Peck v. Vandenberg*, 30 *Cal.* 11.) An order setting aside a report of a referee appointed to take an account is merely interlocutory, and not subject to appeal before judgment. (*Johnston v. Dopkins*, 6 *Cal.* 83.) So of an order setting aside a finding in a divorce case, and sending the case back to the referee for further testimony. (*Baker v. Baker*, 10 *Cal.* 528.) It seems that a stay of proceedings granted on an appeal from an order of reference is proper. *Smith v. Pollock*, 2 *Cal.* 94.

47. May be Set Aside.—Judgment is entered upon the report of a referee as a matter of course, and the only mode of taking advantage of it is by moving to set it aside, as on motion for a new trial. (*Headley v. Reed*, 2 *Cal.* 322; *Sloan v. Smith*, 3 *Cal.* 406.) After rendition of judgment, the Court may award a new trial, and set aside the report for any reason that would be sufficient to set aside the report of any arbitrator. (*Sloan v. Smith*, 3 *Cal.* 406; *Headley v. Reed*, 2 *Cal.* 322.) The provisions of the Practice Act relating to new trials are general, and vest in courts the same power in cases tried by a referee as in other cases. *Cappe v. Brizziolara*, 19 *Cal.* 607.

CHAPTER VI.

EXCEPTIONS.

1. An exception is an objection, usually made during the trial of a cause, and which would not appear of record in the case unless so taken. It is always interposed upon the theory that some ruling has been made by the Court which is erroneous, and to which erroneous decision or ruling the party makes an objection. Such exception is either noted by the Clerk of the Court, or the official reporter if there be one, or in the Judge's minutes, or, what is more usual and indeed the better practice, it is briefly written out by the attorney objecting at the time, and then corrected and signed by the Court, and thus becomes a bill of exception, on which the party may appeal to the Supreme Court without further assignment of errors. See *Cal. Pr. Act*, § 188; *Stat. of Cal.* 1861, p. 589.

2. An exception, to secure a reversal of the decision, must go to some vital point, something material; (*Cal. Pr. Act*, § 188;) not to a mere slight or trifling error. It is not every error which will be reviewed by an appellate court. The exception should state the point with clearness, so that there can be no question in the higher courts relative to *what the question is*. No particular form is necessary to be adopted. Any language, written even in a very informal manner, if it points out the alleged error with clearness, is good. No specific

rule can be laid down to govern each case, but one thing should always be the rule: an objection should not be interposed at random, with the hope merely of saving a point not then in sight.

3. An exception is taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time, from the calling of the action for trial to the rendering of the verdict or decision. (*Quivey v. Gambert*, 32 *Cal.* 304.) The sole object of a bill of exceptions is to make a record of the special action of the Court of what is not record by the general law. (*Parsons v. Davis*, 3 *Id.* 425.) And it is not necessary to embody therein any matter of record. (*Johnson v. Sepulveda*, 5 *Id.* 115.) But documents and affidavits, to be reviewed by the appellate court, must be embodied in a bill of exceptions or record. (*Gates v. Buckingham*, 4 *Cal.* 285.) So of affidavits as to the incompetency of a juror. *People v. Stonecifer*, 6 *Id.* 411.

4. Where the record on appeal did not contain the whole judgment roll, and the absent portion were not presented in a bill of exceptions or statement on appeal, no questions arising on matters contained in such absent portions can be made on appeal. (*Hastings v. Cunningham*, 35 *Cal.* 549.) But where the bill of exceptions appears upon its face to have been regularly taken, the Court cannot presume against the record. (*United States v. Hodge*, 6 *How. U.S.* 279.) Nor will it sustain mere technical exceptions taken in the course of

the trial, unless compelled by law so to do. *English v. Johnson*, 17 *Cal.* 107.

5. If there is a technical variance between the evidence and finding of facts and the pleading, and no objection is made on that ground in the court below, but the objection is taken for the first time in the appellate court, the judgment will not be reversed by reason of such variance. (*Dikeman v. Norrie*, 36 *Cal.* 94.) So, likewise, on the ground of variance between pleadings and proof, or of admission of evidence not within the issue; (*Com. Bank of Rochester v. Rochester Cit. Bk.*, 46 *Barb.* 371; *Allen v. Merc. Mut. Ins. Co.*, *Id.* 642;) or in respect of a defect of the evidence produced; (*Colwell v. Lawrence*, 24 *How. Pr.* 324;) or of defects in the pleadings themselves; (*Simmons v. Sisson*, 26 *N.Y.* 264; *Fassett v. Tallmadge*, 18 *Abb. Pr.* 48; *Ashley v. Marshall*, 29 *N.Y.* 494;) or of an erroneous admission or assumption of the existence of matters not proved in fact. *People v. Third Av. R.R.*, 30 *How. Pr.* 121; *Paige v. Fazakerly*, 36 *Barb.* 392; *McDonald v. Christie*, 42 *Barb.* 36.

6. Where the transcript contained, together with the judgment roll, a copy of an order, certified to by the Clerk, sustaining a demurrer to a replication, and there was no statement or bill of exceptions: *Held*, that the appellate court could not review the action of the court below upon the demurrer. (*Bostwick v. McCorkie*, 22 *Cal.* 669.) A party may take his bill of exceptions to the admission or exclusion of testimony, or to the rulings of the Judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the

exception taken; the presiding Judge shall sign the same, as the truth of the case may be, which bill shall then become a part of the record; and it shall only be necessary to bring to the Supreme Court the transcript of the pleadings, and the judgment, and the bill or bills of exception so taken. (*Stat. of Cal.* 1861, p. 589, § 4.) A bill of exceptions must be reduced to writing, and settled by the Judge immediately upon taking the exception. (*Cent. P. R.R. v. Pearson*, 35 *Cal.* 247.) And afterwards annexed to the judgment roll. *More v. Del Valle*, 28 *Cal.* 170.

7. The Supreme Court notices only the errors committed against the appellant, not those committed against the successful party. (*Frank v. Doane*, 15 *Cal.* 304.) Exceptions taken by the prevailing party are not available to his adversary, unless there be a cross appeal. (*Beach v. Cooke*, 28 *N.Y.* 508.) Where the *respondent* takes no appeal—at least where he files no transcript and assigns no errors—the judgment will not be reversed at his instance. (*Travers v. Crane*, 15 *Cal.* 12.) It has been the practice of the Supreme Court to examine the case only upon the errors assigned by the appellant, and not to look into the exceptions taken by respondent. (*Jackson v. Feather River Water Co.*, 14 *Cal.* 18.) The party alleging error on appeal must make it affirmatively appear; (*Todd v. Winants*, 36 *Cal.* 129;) as the Court will not consider on appeal rulings to which no exception was taken in the court below. (*Keeran v. Griffith*, 34 *Cal.* 581.) If parties choose to submit to rulings without taking exceptions, they cannot afterward question them here. (*Briggs v. Waugenheim*, *Cal. Sup. Ct., Oct. T.*, 1869.) And the exception when taken must be specific, and must point out the exact

nature and extent of the objection relied on, to be available for a review. (Thomas *v.* Fleury, 26 *N.Y.* 26; Orser *v.* Orser, 24 *N.Y.* 51; Buck *v.* Remsen, 34 *N.Y.* 383; Mallory *v.* Perkins, 9 *Bosw.* 572; Varnum *v.* Taylor, 10 *Id.* 148; Jones *v.* Hausman, *Id.* 168; Van Amringe *v.* Barnett, 8 *Id.* 357; Hotchkins *v.* Hodge, 38 *Barb.* 117; Button *v.* McCauley, 38 *Id.* 413; Shotwell *v.* Mali, *Id.* 445; Graham *v.* Chrystal, 1 *Abb. Pr. (N.S.)* 121; Mayor of New York *v.* Exchange Fire Ins. Co., 9 *Bosw.* 424; Butterworth *v.* Pecare, 8 *Id.* 671.) But where the ruling is in general terms, a general exception may suffice. 44 *Barb.* 42; 43 *Id.* 622; Collyer *v.* Collins, 17 *Abb. Pr.* 467.

8. Where the parties have not made a case nor a bill of exceptions, but have relied upon the testimony taken down by the Clerk, pursuant to Section two hundred and seventy-one of the Practice Act of 1850, no question can be raised, on appeal, respecting the decisions of the court below during the progress of the trial. The case of (Gunter *v.* Geary, 1 *Cal.* 463) affirmed in this respect. (Pierce *v.* Minturn, 1 *Id.* 470.) A mere transcript of the evidence taken down by the Clerk is no part of the record, unless made so by bill of exceptions. Wilson *v.* Middleton, 2 *Id.* 54; these cases affirmed in Castro's Executors *v.* Armesti, 14 *Id.* 38.

ERROR IN LAW.

9. For error of law, excepted to, an appeal lies without motion for a new trial. (Reed *v.* Gashirie, 13 *Cal.* 53.) So, the granting a nonsuit on the facts is a question of law, and may be reviewed on appeal without motion for new trial. (Cravens *v.* Dewey, 13 *Cal.* 42; Darst *v.* Rush, 14 *Id.* 83.) When errors of law are

relied upon as errors on appeal, the particular errors must be pointed out by the counsel; otherwise they will be disregarded, unless they plainly appear from the transcript on appeal. (*Sanchez v. McMahon*, 35 *Cal.* 218; see *Post*, Note 16.) See, as to positive waiver of objection, on the ground of error of law committed at the trial, unless the exception be taken to it at the time, (*McCartney v. Fitz-Henry*, 16 *Cal.* 186; *Tyson v. Wells*, 2 *Id.* 122; *Barlow v. Scott*, 24 *N.Y.* 40; *Pollen v. Leroy*, 10 *Bosw.* 38; *Brown v. Platt*, 8 *Id.* 324; *Colwell v. Lawrence*, 38 *Barb.* 643; *Hotchkiss v. Hodge*, *Id.* 117; *Van Amringe v. Barnett*, 8 *Bosw.* 351; *Enos v. Eigenbrodt*, 32 *N.Y.* 444; *Mayor of N.Y. v. Erben*, 10 *Bosw.* 180.) Error in law, occurring at a trial, may be reviewed upon a bill of exceptions, as well as upon a motion for a new trial. (*Walls v. Preston*, 25 *Cal.* 61.) But an order striking out a statement on motion for a new trial cannot be brought before the Supreme Court for review by a bill of exceptions. (*Quivey v. Gambert*, 32 *Id.* 304.) On appeal by a plaintiff from an order overruling a motion for a new trial made by him on the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff will not be considered. *Pierce v. Jackson*, 21 *Id.* 636.

10. The objection that the judgment is not authorized by the pleadings may be taken on an appeal from the judgment roll alone. The fact that a motion for a new trial was made, which did not state this as one of the grounds, does not operate as a waiver of the objection. (*Putnam v. Lamphier*, 36 *Cal.* 151.) This Court can notice a material and incurable defect in the plead-

ings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here. *Garland v. Davis*, 4 *How. U.S.* 131.

11. Where the court below tries the cause without a jury, the proper mode of reserving questions of law is to ask the Court to decide them, and note the refusal in a bill of exceptions. (*Griswold v. Sharpe*, 2 *Cal.* 17; *Lucas v. San Francisco*, 28 *Id.* 591.) Where plaintiffs, having excepted to the ruling of the Court excluding certain evidence, take, in consequence of such ruling, a nonsuit with leave to move to set aside, they do not waive any of their rights as to the exceptions taken. Objections to the introduction of evidence confined on appeal to the grounds taken below. *Natoma W. and M. Co. v. Clarkin*, 14 *Id.* 549.

EXCEPTIONS TO EVIDENCE.

12. **Admission of Evidence.**—A bill of exceptions which says that the paper was *offered* in evidence does not show that the paper was read in evidence. (*Page v. O'Brien*, 36 *Cal.* 559.) An objection to the sufficiency of evidence should be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence. (*Goodale v. West*, 5 *Cal.* 339; *Mott v. Smith*, 16 *Cal.* 533; *Hoxie v. Allen*, 38 *N.Y.* 175.) Objections to the introduction of evidence must be taken on the trial below; they cannot be taken for the first time in the appellate court. (*Covillaud v. Tanner*, 7 *Cal.* 38; *Fontain v. Pettee*, 38 *N.Y.* 184; *Laber v. Cooper*, 7 *Wall. U.S.* 565.) There is nothing in the Statute which requires that exception to depositions shall be filed before the time of the trial. The objection can be made at any time before they are read in evidence. *Dye v. Bailey*, 2 *Cal.* 384.

13. **Documentary Evidence.**—An exception to the admissibil-

ity of a deed in evidence must be taken on the trial of the cause, at *nisi prius*. The point cannot be considered on appeal. (Pearson v. Snodgrass, 5 Cal. 478; Posten v. Rasette, *Id.* 467.) Objections to the form of a deed must be made on the trial at *nisi prius*. (Posten v. Rasette, 5 Cal. 468.) A statement in a bill of exceptions that the plaintiff offered in evidence a deed to him and others, conveying the demanded premises to the parties therein named, according to their respective interests, does not show whether the deed conveyed the land to the parties as tenants in common or in severalty. Page v. O'Brien, 36 Cal. 559.

14. Irrelevant Testimony.—If in a trial before the Court, without a jury, irrelevant testimony is received, with the understanding that it is not to be considered by the Court unless other testimony is afterwards introduced making it relevant, and such testimony is not afterwards introduced, the presumption will be that the Court discarded the evidence in rendering judgment, and the error is without consequence. (Jones v. Morse, 36 Cal. 205.) As to the necessity of repeating an objection taken to a question after answer given, if inadmissible, see (Butterworth v. Pecare, 8 Bosw. 671.) A conditional exception to evidence, subject to a future decision, must be repeated positively after decision made. (Bihin v. Bihin, 17 Abb. Pr. 19.) Exception is nullified where the defect excepted to is supplied during the trial. (Cronise v. Fitch, 14 Abb. Pr. 346; Park Bank v. Tilton, 15 *Id.* 384.) A party cannot, by consenting to admit evidence "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the Court below, and after fishing for a verdict, for the first time assign his objections in the Supreme Court. Covillaud v. Tanner, 7 Cal. 38.

15. Insufficiency of Evidence.—The only mode in which error in findings, from insufficiency of the evidence to support them, can be reached on appeal is by making such insufficiency a ground of motion for a new trial, specifying wherein it is insufficient. (Deputy v. Stapleford, 19 Cal. 302; Regla v. Martin, *Id.* 474; Cowing v. Rogers, 34 Cal. 648; Rice v. Inskeep, 34 Cal. 25; Gagliardo v. Hoberlin, 18 *Id.* 394.) The only mode of obtaining a review of any decision on a trial by the Court, whether during its progress or at its close, is by an appeal under *N.Y. Code*, § 348; *Cal. Pr. Act*, § 333; Mallory v. Wood, 14 *How. Pr.* 67; 3 *Abb. Pr.* 371; Wright v. Delafield, 11 *How. Pr.* 465; Wat-

son *v.* Scriven, 7 *How. Pr.* 9; Hunt *v.* Bloomer, 3 *Kern.* 341; 12 *How. Pr.* 567.

16. Special Exception Necessary.—Where a party objects to the admission of testimony on trial, he must state the point of his objection at the time. General objection will not do. (*People v. Apple*, 7 *Cal.* 290; *Kiler v. Kimball*, 10 *Id.* 268; *Martin v. Traverse*, 12 *Id.* 245.) The party should lay his finger on the point at the time of trial; otherwise this Court cannot review it. (*Martin v. Traverse*, 13 *Cal.* 243; *Sneed v. Osborn*, 25 *Cal.* 619; *Baker v. Joseph*, 16 *Cal.* 177; *Leet v. Wilson*, 24 *Id.* 399; *Roberts v. Chan Tin Pen*, 23 *Id.* 259; *Kiler v. Kimball*, 10 *Id.* 267.) A party is confined to the objections raised upon the trial. (*Waterville Manf. Co. v. Brown*, 9 *How. Pr.* 27; *Smith v. Floyd*, 18 *Barb.* 523; *Staring v. Bowen*, 6 *Barb.* 109; see, however, *Keyes v. Devlin*, 3 *E. D. Smith*, 518; see *Ante*, p. 427, n. 16.) General objection is not good unless the evidence objected to be absolutely incompetent, in which case such general objection is available. (*Nightingale v. Scannell*, 18 *Cal.* 315.) Or where the testimony could not, under any possible circumstances, have been relevant. (*Dreux v. Domec*, 18 *Cal.* 83; *Sneed v. Osborn*, 25 *Cal.* 619.) So, where error is alleged in the exclusion of testimony, it must clearly appear on the face of the exception that the testimony *was*, not that possibly it *might have been*, relevant. (*Cohn v. Mulford*, 15 *Cal.* 50.) So of a trial before referees. (*Branger v. Chevalier*, 9 *Cal.* 362.) Where a defendant's objection to the admission of testimony on the trial is *general*, he cannot be permitted to make it *special* for the first time in this Court. *People v. Glenn*, 10 *Cal.* 32.

17. When Exception Lies.—The comments of the Judge upon the evidence are not subject to exception. (3 *Barb.* 31; *Buck v. Remsen*, 34 *N.Y.* 383; *Gardner v. Barden*, 34 *N.Y.* 433.) It is questionable whether an exception lies to an illegal question put by a juror. *Kelly v. Commonwealth Ins. Co. of Penn.*, 10 *Bosw.* 82.

EXCEPTIONS TO FINDINGS.

18. Defective Findings.—Defective findings should be specially excepted to in the court below. (*Cook v. De La Guerra*, 24 *Cal.* 237; *Warner v. Holman*, *Id.* 228; *Hurlburt v. Jones*, 25 *Id.* 225; *Bryan v. Maume*, 28 *Id.* 238; *Lyons v. Leimback*, 29 *Cal.* 139; *Troy v. Clarke*, 30 *Cal.* 419; *Green v. Clark*, 31 *Id.* 591; *McClusky v. Gerhauser*, 2

New. 47.) And the exceptions should point out wherein the defect consists. *Hidden v. Jordan*, 28 *Cal.* 301.

19. Findings Qualified.—That the finding is qualified by the words “as to plaintiff, Parke,” should be taken in the court below. *Parke v. Hinds*, 14 *Cal.* 415.

20. Must be Specially Excepted to.—The decision of the Court shall be the basis of the judgment, in the same manner as the verdict of the jury, and without such decision the judgment cannot stand. (*Russel v. Armador*, 2 *Cal.* 305; affirmed in *Bowers v. Johns*, *Id.* 419; *Hoagland v. Clary*, *Id.* 474; *Brown v. Brown*, 3 *Id.* 111; cited in *Vermule v. Shaw*, 4 *Cal.* 214.) And the omission or insufficiency of such decision or findings must be specially excepted to, as the foundation for the appropriate proceedings to set the judgment aside. (*Warner v. Holman*, 24 *Cal.* 228; *Lucas v. San Francisco*, 28 *Cal.* 591; *Calderwood v. Brooks*, *Id.* 151; *Sears v. Dixon*, 33 *Cal.* 326.) Such is also the rule in Missouri. (*Ragan v. McCoy*, 26 *Mo.* 166.) But it is otherwise in New York, where the omission of any finding of facts is an irregularity, to be corrected by motion to set aside the decision or judgment; (*Hulce v. Sherman*, 13 *How. Pr.* 411; *Church v. Erben*, 4 *Sandf.* 691; *Heroy v. Kerr*, 21 *How. Pr.* 409, 423;) and not by exception and appeal. (*Id.*; *Thomas v. Tanner*, 14 *How. Pr.* 426; *Burger v. Baker*, 4 *Abb. Pr.* 11; *Grant v. Morse*, 22 *N.Y.* 323; *Heroy v. Kerr*, 21 *How. Pr.* 409; see, also, *People v. Allright*, 14 *Abb. Pr.* 305; *Sharp v. Wright*, 35 *Barb.* 236; *Peck v. York*, 14 *How. Pr.* 416; *Hulce v. Sherman*, 13 *How. Pr.* 311;) where omission in decision of a part of the issues is remedied by motion to amend; unless such course be impracticable, when it may be set aside. *Peck v. Yorks*, 14 *How. Pr.* 416.

21. Time of Filing Exceptions.—As to time of filing exceptions to findings, and serving of notice, see *Cal. Pr. Act*, 180; see also, *Gay v. Moss*, 34 *Cal.* 125.

22. Want of Findings.—If there be a material fact, in respect to which the findings are silent, the party aggrieved may except to them by pointing out the particular defect or omission complained of, and if the Court refuse to correct them, the remedy is by appeal. But if on any material fact the Court finds contrary to or without sufficient evidence, this is ground for a new trial only. (*Hathaway v. Ryan*, 35 *Cal.* 188.) Under the Statute to regulate appeals (*Stat. of Cal.* 1861,

p. 589), which provides that a judgment shall not be reversed "for want of a finding, or for a defective finding of the facts, unless exceptions be made," etc., every material fact not found by the Court will be presumed to be consistent with the judgment. (*Emmal v. Webb*, 36 *Cal.* 197.) But where the findings are contrary to or unsupported by the evidence, the only proper proceeding to correct them is a motion for a new trial, and not an exception to the findings. (*Hidden v. Jordan*, 28 *Cal.* 304; *Miller v. Grim*, 30 *Cal.* 408; *Cowing v. Rogers*, 34 *Cal.* 648; *Rice v. Inskeep*, *Id.* 224; *Prince v. Lynch*, *Cal. Sup. Ct., Jul. T.*, 1869.) In case of a want of findings, objection cannot be taken unless a finding was asked for, and the Court omitted or refused the same, and exception was taken to such omission or refusal. *Lucas v. San Francisco*, 28 *Cal.* 591; *Hidden v. Jordan*, *Id.* 301.

23. When Necessary.—Exceptions need not be taken where the facts found do not warrant the judgment, or where they are inconsistent with the judgment. (*Lucas v. San Francisco*, 28 *Cal.* 591.) The office of exceptions to findings is to supply the want of findings, where upon any of the issues the facts are insufficiently found, or not found at all. (*Cowing v. Rogers*, 34 *Cal.* 648.) A general exception to finding of mixed questions of law and fact does not raise the question whether the fact found is sustained by the evidence. (*People v. Allright*, 14 *Abb. Pr.* 305.) It is not necessary to take exceptions to the findings, if the appellant attacks only the conclusions of law drawn from the facts found. *Solomon v. Reese*, 34 *Cal.* 28; *Gay v. Moss*, *Id.* 125; *Tomlinson v. Mayor of New York*, 23 *How. Pr.* 452; *Rogers v. Beard*, 20 *How. Pr.* 98.

EXCEPTIONS TO INSTRUCTIONS.

24. Exception must be Taken.—Appellant cannot avail himself of error in the court below, in instructing the jury or in modifying instructions asked; unless he excepts in the court below. (*Lightner v. Menzell*, 35 *Cal.* 452.) A party cannot take his chances for a verdict on instructions given or refused, without exceptions taken, and then, after verdict, except to the action of the Court, upon motion for new trial. *Letter v. Putney*, 7 *Cal.* 423.

25. Exception, when Taken.—The one hundred and eighty-eighth section of the Practice Act does not fix the precise time when an exception to the charge of the Court to the jury must be taken. (*St. John v. Kidd*, 26 *Cal.* 265.) If an exception to the charge of the

Court to the jury is taken after the jury have withdrawn to consider of their verdict, and before the verdict is rendered, the question of allowing or disallowing the exception rests in the discretion of the Court, and, whether allowed or disallowed, the Supreme Court will not interfere with the exercise of this discretion. *Id.*

26. Instructions Refused.—It is not error to refuse to give instructions asked for, if those given cover the whole case. *Laber v. Cooper*, 7 *Wall. U.S.* 565.

27. Must be Specific.—Exceptions to the charge of a Court should point out the specific portions of the charge excepted to, and should be made at the time of the trial, before the jury retires. (*Hicks v. Coleman*, 25 *Cal.* 123.) A general exception to a charge to the jury will not be sustained, if any part of the charge is correct. (*Lincoln v. Chafin*, 7 *Wall. U.S.* 132.) A general exception to the whole charge will not lay ground for a review in detail. Even when taken to "each and every ruling, severally, separately and distinctly," *held*, in first case below stated, that it amounts to nothing. (*Newell v. Doty*, 34 *N.F.* 89, 93; *Magee v. Badger*, *Id.* 247; *Chamberlin v. Pratt*, 33 *N.F.* 47, 52.) To an ambiguous charge, the exception must present the modification which will free it from ambiguity, or general objection will be untenable. *Springstead v. Lawson*, 23 *How. Pr.* 312; 14 *Abb. Pr.* 328.

PART NINTH.

JUDGMENTS AND DECREES.

CHAPTER I.

JUDGMENT IN GENERAL.

1. A judgment is the final determination of the rights of the parties in the action or proceeding, and may be entered in term or vacation. (*Cal. Pr. Act*, § 144; *N.Y. Code*, § 245.) Every definite sentence or decision of a Court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law, and as such subject to the revisory jurisdiction of the appellate court. (*Belt v. Davis*, 1 *Cal.* 138.) It should distinctly express what is given or denied. * (14 *Vin.* 612; 6 *Dane Ab.* 90; *Lawes on Pl.* 669; *Whitaker v. Bramson*, 2 *Paine*, 209.) The opinion of the Judge on collateral matters is no part of the judgment; (*Ward v. The "Fashion,"* 1 *Newb.* 41;) nor his reasons given in his findings. *Burke v. Table Mountain Water Co.*, 12 *Cal.* 403.

JURISDICTION OF COURT.

2. If the Court has jurisdiction of the person of the defendant and the subject matter, the judgment is good against a collateral attack, however erroneous it may be. (*Moore v. Martin*, *Cal. Sup. Ct., Ful. T.*, 1869; citing *Hahn v. Kelly*, 34 *Cal.* 391.) If it appear, by the record, or otherwise, that the Court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in issue, and a sale of property under it will be void also. (*McMinn v. Whelan*, 27 *Cal.* 309; *Whitwell v. Barbier*, 7 *Cal.* 54; *Forbes v. Hyde*, 31 *Id.* 342.) A party against whom a judgment has been rendered by a court of general jurisdiction will be presumed to have been made a party to the suit in some of the ways provided by law, unless the contrary appears affirmatively by the record. *Sharp v. Daugney*, 33 *Cal.* 505.

3. The district courts in California, by virtue of their organization and common law powers, have full authority, except when limited by the Constitution or Practice Act, to pronounce such judgment as the exigency of each case shall require. (*Stewart v. Levy*, 36 *Cal.* 159.) Jurisdiction will generally be presumed in the case of superior courts; but if the want of jurisdiction appears on the face of the record of the judgment of a superior court, the judgment is void, and it may be attacked in a collateral proceeding. (*Forbes v. Hyde*, 31 *Cal.* 342; affirmed in *Hahn v. Kelly*, 34 *Id.* 391; *Thompson v. Manrow*, 2 *Id.* 100; *Kilburn v. Ritchie*, 2 *Id.* 148; *White v. Abernathy*, 3 *Id.* 426; *John-*

son *v.* Sepulveda, 5 *Id.* 151; Grewell *v.* Henderson, 7 *Id.* 292; Nelson *v.* Lemmon, 10 *Id.* 50.) The true test is, whether the omission be of the form or of the substance of the act required to be performed. If of the substance, then the judgment is a nullity; if of form, only an irregularity. (Hahn *v.* Kelly, 34 *Cal.* 391.) The presumption in favor of a judgment of a court of general jurisdiction is overthrown when the record of the entire case discloses a want of jurisdiction. Gray *v.* Hawes, 8 *Id.* 569.

4. It is essential to the validity of a judgment that it be rendered by a court of competent jurisdiction, at the time and place, and in the form prescribed by law. (Wicks *v.* Ludwig, 9 *Cal.* 173.) A judgment does not depend upon the Clerk performing his duty in making up the judgment roll, or in preserving the papers. If the facts necessary to give jurisdiction to the Court exist, the judgment is good. Lick *v.* Stockdale, 18 *Id.* 219; Sharp *v.* Lumley, 34 *Id.* 611; Hutchinson *v.* Bours, 13 *Id.* 50.

FINAL JUDGMENT.

5. The correct rule appears to be that the words "*final judgment*" must be understood as applying to all judgments and decrees which determine the particular cause, and that it is not requisite that such judgment should finally decide upon the rights which are litigated. (Belt *v.* Davis, 1 *Cal.* 138; Cooley *v.* Patterson, 52 *Maine*, 472; Sheldon *v.* Williams, 52 *Barb.* 183; Klink *v.* Steamer "Cussetta," 30 *Ga.* 504.) So, an order setting aside a former judgment is a final judgment. (Explaining Loring *v.* Illsley, 1 *Cal.* 28.) Every def-

inite sentence or decision of a court by which the merits of the case are determined is a final judgment. (*Id.*) But no question must be reserved. (*Belmont v. Power*, 3 *Robt.* 693.) So, a judgment dismissing a suit in which a temporary injunction had been granted is a final judgment (*Dowling v. Pollock*, 18 *Cal.* 625) in favor of the defendant. (*Leese v. Sherwood*, 21 *Id.* 151.) Order, as contra-distinguished from a final judgment, see (*Ante*, *p.* 279; see, also, *Gilman v. Contra Costa Co.*, 8 *Cal.* 57; *McKinley v. Tuttle*, 34 *Id.* 235.) A judgment by an equally divided court, affirming the judgment of the court below, is a determination as final as if rendered by a unanimous court. *Durant v. Essex Co.*, 7 *Wall. U.S.* 107.

6. The judgment or decree of a court of competent jurisdiction is not only final as to the matters actually determined, but as to every other matter which the parties might have litigated and had decided under the pleadings. (*La Guen v. Gouverneur*, 1 *Johns. Cas.* 436; approved in *Brown v. Howe*, 2 *Barb.* 596; *Southgate v. Montgomery*, 1 *Paige Ch.* 47; *Simson v. Hart*, 14 *John.* 77.) This is stating the proposition a little too broadly; it is more correctly stated in *Miller v. Manill*, 6 *Hill*, 151, which see.

7. As to what judgments are final, consult, in ejectment, (*Smith v. Trabue*, 9 *Pet.* 4.) By default on promissory notes, (*Clements v. Berry*, 11 *How. U.S.* 398.) In action on contract, (*Whitaker v. Bramson*, 2 *Paine*, 209.) The distinction between a judgment which is *final*, and one which is *definitive*, explained in (*United States v. The "Peggy,"* 1 *Cranch*, 103.) As to what decrees are final, and when decrees become

final, consult (*Jenkins v. Eldredge*, 1 *Woodb. & M.* 61; *Porter v. United States*, 2 *Paine*, 313.) The distinction between decrees which are final and those which are interlocutory discussed in (*Chouteau v. Rice*, 1 *Minn.* 24; see, also, *Forgay v. Conrad*, 6 *How. U.S.* 201; *Perkins v. Fourniquet*, *Id.* 206; *Pullian v. Christian*, *Id.* 209; *De Armas v. United States*, *Id.* 103.) Although a judgment may be final with reference to the Court that pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to appeal and liable to be reversed. *Hills v. Sherwood*, 33 *Cal.* 474.

JUDGMENT MUST FOLLOW ALLEGATIONS AND PROOFS.

8. The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata*, is fundamental in the administration of justice. (2 *Comst.* 506; *Id.* 160; 6 *Seld.* 363; 4 *Barb.* 265; 20 *Id.* 473; *Rome Exch. Bk. v. Eames*, 1 *Keyes*, 588; *Wright v. Delafield*, 25 *N.Y.* 266; reversing S.C., 23 *Barb.* 498; *Coleman v. Sec. Av. R.R. Co.*, 38 *N.Y.* 201; *Ryder v. Jenny*, 2 *Robt.* 56; *Gordon v. Hostetter*, 37 *N.Y.* 99; *Desnoyer v. Hereux*, 1 *Minn.* 17.) So of a decree in equity. *Vattier v. Hurde*, 7 *Pet.* 252; *Crockett v. Lee*, 7 *Wheat.* 522; *Boone v. Chiles*, 10 *Pet.* 177; *Jackson v. Ashton*, 11 *Pet.* 229.

9. Although the distinctions between proceedings at law and in equity have been abolished, yet it is evident that judgments at law and in equity cannot be assimilated. (*Butler v. Lee*, 3 *Keyes*, 70; 33 *How. Pr.*

251; *Towle v. Jones*, 1 *Robt.* 87; *Mann v. Fairchild*, 2 *Keyes*, 106.) But affirmative relief may be granted, though not asked for in the answer. (*Cal. Pr. Act*, § 199; *Cythe v. Lafontain*, 31 *Barb.* 186.) So held in an action for the fraudulent issue of stock, and to adjust claims growing out of the frauds. *N.Y. and N.H. R.R. Co. v. Schuyler*, 34 *N.Y.* 20.

10. A plaintiff must recover, if at all, according to the averments in his complaint, and a court is not warranted in rendering a judgment in favor of plaintiff when there is no averment in the complaint upon which the judgment can be based. (*Sterling v. Hanson*, 1 *Cal.* 480; *Benedict v. Bray*, 2 *Id.* 256; see *Holman v. Vallejo*, 19 *Id.* 498; *Coleman v. Second Av. R.R. Co.*, 38 *N.Y.* 201; affirming 48 *Barb.* 371.) So held in an action on covenant, where the only relief demanded was a sum in damages. (*Ryder v. Jenny*, 2 *Robt.* 56.) So in conversion. (*Gordon v. Hostetter*, 37 *N.Y.* 99; 4 *Abb. Pr.* 263.) So, also, in a creditor's suit. (*Durand v. Hankerson*, 39 *N.Y.* 287.) In other actions, see (*Archer v. Morehouse*, *Hempst.* 184; *Campbell v. Pope*, *Id.* 271; *Davidson v. Brown*, 1 *Cranch C. Ct.* 250; *Huft v. Hutchinson*, 14 *How. U.S.* 586; *Hughes v. Union Ins. Co.*, 8 *Wheat.* 294.) A judgment on a complaint that does not state facts sufficient to constitute a cause of action cannot be sustained. *Barron v. Frink*, 30 *Cal.* 486.

JOINT AND SEVERAL JUDGMENT.

11. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; (*Cal. Pr. Act*, § 145;) or it may be

both for and against one of the parties. (*Rowe v. Chandler*, 1 *Cal.* 167.) In an action against defendants jointly indebted, where only one is served, a several judgment may be entered against him; (*Hirschfield v. Franklin*, 6 *Cal.* 607; *Ingraham v. Gildemeester*, 2 *Cal.* 88;) as a judgment is void as against a party not served. (*Inas v. Winspear*, 18 *Cal.* 397; *Stearns v. Aguirre*, 7 *Cal.* 449; *Lewis v. Clarkin*, 18 *Id.* 399; *Hood v. Maxwell*, 1 *West Va.* 219.) Where a portion only of the parties are served with process, the Clerk cannot, on the application of plaintiff, enter judgment upon default against parties served only. A judgment so entered is void. (*Kelly v. Austin*, 17 *Cal.* 564.) The proper course in such case is to enter judgment against all the defendants, but so as to be enforced against the joint property of all and the separate property of those served. (*Id.*; see, also, *Brady v. Reynolds*, 13 *Cal.* 31; *People v. Frisbie*, 18 *Cal.* 402.) Where there is an appearance by both, defendant's judgment should be against both. *Flake v. Carson*, 33 *Ill.* 518.

12. The Statute authorizes the entry of judgment against the joint property of the defendants, where suit is brought on a joint contract, and one or more, but not all of the defendants, were served with process. (*Cal. Pr. Act*, § 32; *Fay v. Hawley*, *Cal. Sup. Ct., Jan. T.*, 1870.) The Statute has herein changed the common law rule, which is that in an action upon a joint contract the plaintiff must recover against all or none. (*People v. Frisbie*, 18 *Cal.* 402; *Lewis v. Clarkin*, *Id.* 399; cited in *Fay v. Hawley*, *Cal. Sup. Ct., Jan. T.*, 1870; *People v. Rooney*, 29 *Cal.* 642.) See, as to common law rule, *Milne v. Huber*, 3 *McLean*, 212; *Carlton v. Chouteau*, 1 *Minn.* 102; *Barton v. Petit*, 7 *Cranch*, 194;

Reutgen *v.* Kanowrs, 1 *Wash. C. Ct.* 168; Conner *v.* Cockrill, 4 *Cranch C. Ct.* 3.

WHEN A BAR.

13. The judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar, and as evidence, conclusive between the same parties, upon the same matter directly, in another court. (*Love v. Waltz*, 7 *Cal.* 250.) As to judgments, when a bar and when not a bar, consult Vol. ii., p. 715; 3 *East*, 356; see, also, *Judson v. Atwill*, 9 *Cal.* 477; *Uhlfelder v. Levy*, *Id.* 607; *Weaver v. Conger*, 10 *Cal.* 233; *Nickerson v. Cal. Stage Co.*, 10 *Cal.* 520; *Pico v. Webster*, 12 *Cal.* 140; *Imlay v. Carpenter*, 14 *Cal.* 175; *Chase v. Swain*, 9 *Cal.* 136; *Soule v. Dawes*, 14 *Cal.* 249; *Hernter v. Porter*, 23 *Cal.* 385; *Hobbs v. Duff*, 23 *Cal.* 596; *Carpenter v. Schmidt*, 26 *Cal.* 490; *Garwood v. Garwood*, 29 *Cal.* 514; *Hough v. Waters*, 30 *Cal.* 309; *Reed v. Calderwood*, 32 *Cal.* 109; *Semple v. Wright*, 32 *Cal.* 659; see, also, *Robinson v. Howard*, 5 *Cal.* 428; and *Reynolds v. Harris*, 9 *Cal.* 338; *Sherman v. Dilley*, 3 *Nev.* 21; *Hughes v. Blake*, 1 *Mas.* 515; *Sturdy v. Jackaway*, 4 *Wall. U.S.* 174; *Goodrich v. The City*, 5 *Wall.* 566; *Lovejoy v. Murray*, 3 *Wall. U.S.* 1; *Blackburn v. Crawfords*, *Id.* 175; *Thurston v. Spratt*, 52 *Me.* 202; *Child v. Eureka Powder Works*, 45 *N.H.* 547; *Farr v. Ladd*, 37 *Vt.* 156; *Hanscour v. Hewes*, 12 *Gray (Mass.)* 334; *Milford v. Holbrook*, 9 *Allen*, 17; *Smith v. Way*, *Id.* 472; *Bancroft v. Winspear*, 44 *Barb.* 209; *Noble v. Cope's Adm'rs*, 50 *Penn.* 17; *Sydam v. Cannon*, 1 *Houst. (Del.)* 431; see, also, 13 *Rich. (S.C.)* 171; 30 *Ga.* 818; 37 *Ala.* 306; 36 *Mo.* 437, 602; 15 *Ohio*, 548;

24 *Ind.* 156; *Id.* 248; 25 *Ind.* 42, 458, 486; 34 *Ill.* 457; 18 *Iowa*, 108.

ENTERING JUDGMENT.

14. The Clerk shall keep, among the records of the Court, a book for the entry of judgments, to be called the "Judgment Book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action. (*Cal. Pr. Act*, § 201; *N.Y. Code*, § 280.) It is not necessary for the Clerk, in entering up a judgment, to insert therein recitals of his exposition of the preceding facts. (*Leese v. Clark*, 28 *Cal.* 33.) The recitals in a judgment are *prima facie* evidence only of the facts. (*Leese v. Clark*, 28 *Cal.* 33; *Hahn v. Kelly*, 34 *Cal.* 391.) So, the recital of the service of summons is conclusive of the fact. *Sharp v. Lumley*, 34 *Cal.* 611.

15. Where the Supreme Court reverses the judgment of a district court, and directs the entry of final judgment, such judgment can be entered by the Clerk of the District Court in vacation. (*McMillan v. Richards*, 12 *Cal.* 467.) So, an action tried by the Court without a jury may be entered in vacation. (*People v. Jones*, 20 *Cal.* 50.) As to acts necessary, see *Casement v. Ringgold*, 28 *Cal.* 335.

16. A judgment, *nunc pro tunc*, may be rendered either before or after the term has expired. (*Morrison v. Dapman*, 3 *Cal.* 255; *Swain v. Naglee*, 19 *Id.* 127; *Branger v. Chevalier*, 9 *Cal.* 172; *Hegeler v. Henckell*, 27 *Id.* 491; *Mountain v. Rowland*, 30 *Ga.* 929.) Where after the death of the appellants the appellate court,

not being aware of the death, render a judgment of affirmance upon a subsequent suggestion of the fact, the judgment will be vacated, and a judgment of affirmance rendered as of a day previous to the death, *nunc pro tunc*. *Black v. Shaw*, 20 *Cal.* 68: see *Cal. Pr. Act*, § 202.

17. Clerical errors and misprisions may be corrected *nunc pro tunc*. (*Hegeler v. Henckell*, 27 *Cal.* 491; see *Castro v. Richardson*, 25 *Id.* 49.) The judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim. (*Chase v. Swain, Administrator*, 9 *Cal.* 130.) A court may at any time render or amend a judgment, *nunc pro tunc*, when the record discloses that the entry on the minutes does not correctly give what was the judgment of the Court. *Morrison, Administrator of Ramirez, v. Dapman*, 3 *Cal.* 255.) But an alteration of a judgment by the Court without notice, so as to include a party not served with process, if not void is voidable, at the election of the party. *Chester v. Miller*, 13 *Cal.* 561; *Womack v. Sanford*, 37 *Ala.* 445.

18. If there is any error in the form of the judgment, which is purely technical, without changing in any respect the practical effect of the judgment, the consequences are precisely the same as if it were technically in due form. (*Burnett v. Tolles*, *Cal. Sup. Ct., Oct. T.*, 1869.) The Court may amend the judgment by inserting a clause showing who are personally liable for the debt. (*Leviston v. Swan*, 33 *Cal.* 480.) The rule that a court has no power over its own judgments upon the expiration of the term has no application, except to

final judgments, nor while the proceedings are *in fieri*. (Hastings *v.* Cunningham, 35 *Cal.* 549.) But where a judgment is rendered, and an appeal taken to this Court, the court below loses control over the judgment, and an order amending the judgment is erroneous. Bryan *v.* Berry, 8 *Cal.* 135.

JUDGMENT ROLL.

19. Answer Stricken Out.—An answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment roll. (Abbott *v.* Douglass, 28 *Cal.* 295.) An affidavit upon which to base a motion to strike out an answer, and notice of such motion, and affidavit of its service, constitute no part of the judgment roll. Dimick *v.* Campbell, 31 *Cal.* 238.

20. Bill of Exceptions.—A bill of exceptions made during the progress of a trial should be annexed to the judgment roll. Moore *v.* Del Valle, 28 *Cal.* 170.

21. Order Overruling Demurrer.—Until the amendment to the two hundred and third section of the Practice Act, the judgment roll was not required to contain the order sustaining or overruling a demurrer. (Abadie *v.* Carrillo, 32 *Cal.* 172.) An order submitting a demurrer, where it is taken under advisement, forms no part of the judgment roll. Anderson *v.* Fisk, 36 *Cal.* 625.

22. What Constitutes.—Immediately after entering the judgment, the Clerk shall attach together and file the following papers, which shall constitute the judgment roll: *First*, In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed upon the complaint that the default of the defendant in not answering was entered, and a copy of the judgment. (Hahn *v.* Kelly, 34 *Cal.* 391; Sharp *v.* Daugney, 33 *Cal.* 505.) In all other cases, the summons, pleadings, verdict of the jury, or finding of the court commissioner or referee, all bills of exceptions taken and filed in said action, copies of orders sustaining or overruling demurrers, a copy of the judgment, and copies of any orders relating to a change of parties. (*Cal. Pr. Act*, § 203; *N.Y. Code*, § 281.) If the Clerk neglects to make up the

judgment roll, it does not vitiate the judgment nor the proceedings under it. *Sharp v. Lumley*, 34 *Cal.* 611; *Lick v. Stockdale*, 18 *Cal.* 219; *Sharp v. Daugney*, 33 *Cal.* 505.

No. 1022.

Certificate to Judgment Roll.

[TITLE.]

I, the undersigned, County Clerk of the County of, State of California, and ex-officio Clerk of the District Court of the Judicial District of said State in and for said County, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and recorded in Judgment Book of said Court, at page And I further certify that the foregoing papers, hereto annexed, constitute the judgment roll in said action.

Witness my hand and the seal of said District Court, this day of, 18...

.....,
Clerk.

By,
Deputy Clerk.

DOCKETING JUDGMENT.

23. Immediately after filing a judgment roll, the Clerk shall make the proper entries of the judgment under appropriate heads in the docket kept by him. (*Cal. Pr. Act*, § 204.) If judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general char-

acter of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order. (*Cal. Pr. Act*, § 205.) As to the sufficiency of filing and docketing judgment under the New York practice, see 2 *Laws of N.Y.* 1867, 1,922, Ch. 781, § 10; see *Appleby v. Barry*, 2 *Robt.* 689.

24. The docket is a book which the Clerk shall keep in his office, with each page divided into eight columns, and headed as follows: judgment-debtors; judgment-creditors; judgment; time of entry; where entered in judgment book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered. (*Cal. Pr. Act*, § 205.) The docketing of a judgment imparts constructive notice of the lien of the judgment on the real estate of the judgment-debtor to strangers to the judgment. (Page *v. Rogers*, 31 *Cal.* 293.) It shall be open at all times during office hours for the inspection of the public, without charge. *Cal. Pr. Act*, § 206.

25. The judgment-debtor cannot set up errors in docketing the judgment as destroying its lien, when the property has been sold on execution under the judgment; if the property sold is his, the levy operated as a lien; if not, he has no right to complain. *Low v. Adams*, 6 *Cal.* 277.

LIEN OF JUDGMENT.

26. From the time the judgment is docketed, it shall become a lien upon all the real property of the judgment-debtor, not exempt from execution, in the county, owned by him at the time, or which he may

afterwards acquire, until the said lien expires. *Cal. Pr. Act*, § 204.) The lien shall continue for two years, unless the judgment be previously satisfied. *Cal. Pr. Act*, §§ 204, 207.

27. A lien on real estate commences to run from the docketing of the judgment, unless the judgment is stayed by an order of the Court pending a motion for new trial, or a stay bond on appeal. *Barroilhet v. Hathaway*, 31 *Cal.* 395.

28. In case of an appeal, the lien remains a valid and subsisting lien until the end of two years from and after the date of the *remittitur* from the Supreme Court. *Englund v. Lewis*, 25 *Cal.* 350; *Dewey v. Latson*, 6 *Cal.* 130; but see *Chapin v. Broder*, 16 *Cal.* 404; *Guy v. Du Uprey*, 16 *Cal.* 194.

29. In foreclosure cases, where there is a judgment *in personam*, and also a judgment enforcing a lien and directing a sale of the property, and the undertaking on appeal only stays the sale and provides for costs, the lien of the personal judgment on the judgment-debtor's property in the county where it is docketed attaches at the time it is docketed, and expires at the end of two years from the time the personal judgment is docketed. (*Englund v. Lewis*, 25 *Cal.* 350.) If the plaintiff does not obtain a personal judgment, a decree enforcing the lien and directing a sale of the property does not become a judgment lien on the other property until after sale and deficiency docketed, and then only for the deficiency. *Id.*; *Culver v. Rogers*, 28 *Cal.* 520; *Chapin v. Broder*, 16 *Cal.* 420.

30. A transcript of the original docket, certified by the Clerk, may be filed with the recorder of any other county; and from the time of filing the judgment shall become a lien upon all the real property of the judgment-debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. *Cal. Pr. Act*, § 207.

EFFECT OF JUDGMENT LIEN.

31. **Death of Party to Judgment.**—If a party die after a verdict or decision upon any issue of fact, and before judgment, the Court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate. (*Cal. Pr. Act*, § 202.) The continuance of the name of a deceased plaintiff, instead of that of his executor, in a judgment rendered after the substitution, is an error of form only, and does not make the judgment void. (*Gregory v. Haynes*, 21 *Cal.* 443; *Stötzell v. Fullerton*, 44 *Ill.* 108.) The death of an appellant, after argument of his case on appeal, does not constitute any ground for delaying a decision, or a departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the appellant's death. (*Black v. Shaw*, 20 *Cal.* 68.) The rule is different if the death occurs previous to the argument. In that event, further proceedings can only be had upon leave given after suggestion of the death is made. *Id.*

32. **Equitable Liens.**—The lien of a judgment against the holder of the legal estate is postponed in equity to an equitable right previously acquired. (*Brown v. Pierce*, 7 *Wall. U.S.* 205.) In what cases are judgments and decrees of United States courts liens upon real estate, see (*Ward v. Chamberlain*, 2 *Black. U.S.* 430.) A decree for the payment of money in an admiralty suit *in personam* stands as a lien on the same footing as a decree in equity. (*Ward v. Chamberlain*, 2 *Black. U.S.* 430.) Where a creditor has obtained judgment and caused execution to be delivered to the Sheriff, and the same has been returned unsatisfied for the want of property, he does

not acquire any lien by a bill in equity to discover assets upon his debtor's property. (*Chase v. Searles*, 45 *N.H.* 511.) Where judgment and decrees in equity of State courts are by State laws liens upon land, decrees in admiralty, of United States courts, have the same character and are equally binding. *Ward v. Chamberlain*, 2 *Black. U.S.* 430.

33. Extension of Lien.—The issuing and levy of an execution before the lien of the judgment upon which the execution issued expires, will not operate to prolong the lien of the judgment beyond the time limited in Section two hundred and four of the Code. (*Isaac v. Swift*, 10 *Cal.* 71.) It required express words of the Statute to create the lien, and it equally requires express words to continue it beyond the time specified. *Id.*

34. Property Subject to the Lien.—The lien of a judgment is purely the creature of statute, and when the Statute says "property exempt from execution," it means property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the Court. *Ackley v. Chamberlain*, 16 *Cal.* 181; *Bowman v. Norton*, 16 *Cal.* 213.

35. Release of Lien.—The payment by a judgment-debtor of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the Sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. (*McCarty v. Christie*, 13 *Cal.* 79.) The perfecting an appeal does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 *Cal.* 277.

GOLD COIN JUDGMENT.

36. Accounting.—Upon an accounting, a promise in writing by the defendant to pay the sum found due, in gold coin, justifies a judgment in gold coin. *Dodge v. The Mariposa Co.*, *Cal. Sup. Ct.*, Oct. T. 1867, not reported.

37. Claim and Delivery.—In an action to recover possession of personal property, the plaintiff may recover its value in United States legal tender notes. (*Tarpey v. Shepherd*, 30 *Cal.* 180.) One unlawfully converting property does not sustain any injury, if the jury, in an action to recover possession of the same, find its value in United States legal tender notes. *Id.*

38. Contract.—In an action on a contract or obligation in writing

for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in an action against any person, for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person. *Cal. Pr. Act*, § 200.

39. Costs and Interest in Gold Coin.—Where a contract is made payable in a specific kind of money, the judgment enforcing it may enforce the payment of costs and interest in the kind of money mentioned in the contract. (*Carpentier v. Atherton*, 25 *Cal.* 569.) But it is error for the Court to adjudge the costs in an action for forcible entry and detainer to be paid in gold coin. *Moore v. Del Valle*, 28 *Cal.* 170.

40. Ejectment.—In ejectment, if the Court finds the value of the use and occupation of the premises in both gold and currency, a general judgment may be rendered for the currency value. (*Carpentier v. Small*, 35 *Cal.* 346.) As a matter of law, there is no possible difference in value between gold coin and legal tender notes, nor can evidence be received to prove a difference. (*Id.*; *Poett v. Stearns*, 31 *Cal.* 78.) Where the kind of money received by the defendant is not in issue, and he has received the same in a fiduciary capacity, or to the use of another, it is proper for the Court, upon a verdict for the amount of money, to order judgment in the kind of money received by him. *Pinkerton v. Woodward*, 33 *Cal.* 557.

41. Goods Sold.—If the complaint avers a contract in writing by defendant, to pay for goods sold in gold coin, made before the sale, and such contract is made after suit commenced, but dated before the sale, judgment should be for gold coin. *Meyer v. Kohn*, 29 *Cal.* 278.

42. Legal Tender Act.—The legal tender act held constitutional in (*Lick v. Faulkner*, 25 *Cal.* 404; *Curia v. Abadie*, *Id.* 502; *Kierski v. Matthews*, *Id.* 591; *People v. Mayhew*, 26 *Cal.* 655; *Higgins v. Bear Riv. and Aub. W. and M. Co.*, 27 *Cal.* 153; *Reese v. Stearns*, 29 *Cal.* 273; *Poett v. Stearns*, 31 *Cal.* 78; *Belloc v. Davis*, *Cal. Sup. Ct., Jul. T.*, 1869.) The opinion of the Supreme Court of the United

States reserved on this point in *Bronson v. Rhodes*, *U.S. Sup. Ct.*, *Jan. T.*, 1869.

43. Note and Mortgage.—In the case of *Bronson v. Rhodes*, above referred to, decided by the Supreme Court at its last term, the Court holds that a note and mortgage made in 1851, payable “in gold and silver coin, lawful money of the United States,” must be paid in coin, and that treasury notes are not a lawful tender for the debt. (*Higgins v. B. R. and A. Wat. and Min. Co.*, 27 *Cal.* 153.) And where the original indebtedness was payable in gold coin, the same condition would attach in equity to the mortgage. *Belloc v. Davis*, *Cal. Sup. Ct.*, *Jul. T.*, 1869.

44. Promissory Note.—If a promissory note has the words “in gold coin” after the words “value received,” but does not contain the words “in gold coin” in the promise to pay, judgment should not be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and paper currency of the United States, if not paid in gold coin. (*Lamping v. Hyatt*, 27 *Cal.* 102; *Lane v. Gluckauf*, 28 *Cal.* 288.) Where a note is made payable “in gold and silver coin,” it is error to render judgment for gold coin alone. (*Burnett v. Stearns*, 33 *Cal.* 468; see *Buchegger v. Shultz*, 13 *Mich.* 420.) See, as to bill of exchange payable in gold coin, *Bk. of Prince Edward’s Island v. Trumbull*, 53 *Barb.* 459.

DISMISSAL OF ACTION—NONSUIT.

45. An action may be dismissed, or a judgment of nonsuit entered, in the following cases: *First*, By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the Clerk to the defendant, who may have his action thereon. *Second*, By either party, upon the written consent of the other. *Third*, By the Court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the

dismissal. *Fourth*, By the Court, when, upon the trial, and before the final submission of the case, the plaintiff abandons it. *Fifth*, By the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the Clerk's register. Judgment may thereupon be entered accordingly. *Cal. Pr. Act*, § 148.

46. A party cannot be sent out of court merely because his facts do not entitle him to relief *at law*, or merely because he is not entitled to relief *in equity*, as the case may be. He can be sent out of court only when upon his facts he is entitled to *no relief*, either at law or in equity. If then upon the *facts* stated in his complaint the plaintiff would have been entitled to relief in equity under the old system of practice, the action cannot be dismissed. *Grain v. Aldrich*, *Cal. Sup. Ct.*, *Oct. T.*, 1869; *Peters v. Foss*, 20 *Cal.* 586; *People v. Loewry*, 29 *Cal.* 264.

47. **A Dismissal** of an action under the circumstances shown by the record in this case, by a stipulation signed by both parties, which provides that each party shall pay his own costs, is such a determination of the action in favor of the defendant as will enable him to maintain an action for malicious prosecution. (*Kinsey v. Wallace*, 36 *Cal.* 463.) Allowing an action to rest without service of summons for two years and eight months after the summons is issued, is such a want of diligence as to justify the Court in dismissing the action. *Grigsby v. Napa County*, 36 *Cal.* 585.

48. **By Consent**.—After an action has been tried and submitted, the plaintiff has no right to dismiss it, nor has the Court any authority to enter an order of dismissal without the consent of the defendant. *Heinlin v. Castro*, 22 *Cal.* 101.

49. **By the Court**.—Courts should, of their own motion, dismiss a case based upon a consideration which contravenes public policy,

whether the parties to the suit take the objection or not. (*Valentine v. Stewart*, 15 *Cal.* 387.) As to the power of court in compulsory nonsuits, see (*Ringgold v. Havens*, 1 *Cal.* 108; *Mateer v. Brown*, *Id.* 221; *Elmore v. Grymes*, 1 *Pet.* 469; *D'Wolf v. Rabaud*, *Id.* 476; *Crane v. Morris*, *Id.* 598; *Silsby v. Foote*, 14 *How. U.S.* 218; *Castle v. Bullard*, 23 *How. U.S.* 172; *Folger v. The "Robert G. Shaw,"* 2 *Woodb. & M.* 531; *Tompson v. Campbell*, *Hempst.* 8; *Hyde v. Barker*, *Burn. (Wis.)* 148; compare *Linthicum v. Remington*, 5 *Cranch C. Ct.* 546.) When the plaintiff closes his evidence, if the Court is of opinion that it would not sustain a verdict in favor of plaintiff upon the testimony, a nonsuit should be granted. *Ensminger v. McIntire*, 23 *Cal.* 593.

50. By Plaintiff.—Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter claim. (*Hancock Ditch Co. v. Bradford*, 13 *Cal.* 637.) So in ejectment. Nor, under the one hundred and forty-eighth section of the Practice Act, is he bound to tender costs before the nonsuit. (*Dimick v. Deringer*, 32 *Cal.* 488; *Stewart v. Gray*, *Hempst.* 94; see *Gordon v. Goodell*, 34 *Ill.* 429; *Folger v. The "Robert G. Shaw,"* 2 *Woodb. & M.* 531; *Minor v. Mechanics' Bk. of Alexandria*, 1 *Pet.* 46; *Tobey v. Chaffin*, 3 *Sumn.* 379.) But the plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted and the jury has retired; but such right does exist at any time before such final submission and retirement. (*Brown v. Harter*, 18 *Cal.* 76; *Sanders v. Sanders*, 24 *Ind.* 133.) In ejectment, the plaintiff may, at any time before trial, dismiss the action as to some of the defendants, and proceed against the others alone. (*Reed v. Calderwood*, 22 *Cal.* 463.) If one of several defendants in ejectment answers, and the others make default, the plaintiff may, before trial, dismiss the action as to the defendant answering, and take judgment against the others. (*Dimick v. Deringer*, 32 *Cal.* 488; *Cal. Pr. Act*, § 146.) In an action upon a joint and several bond, where all the persons who sign it are made defendants in the complaint, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants, and take judgment against the others. *People v. Evans*, 29 *Cal.* 429.

51. Dismissal, Effect of.—A dismissal of an action is in effect a final judgment in favor of the defendant. It is a final decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties, as they may be presented in

some other action. *Leese v. Sherwood*, 21 *Cal.* 151; *Minor v. Mechanics' Bk. of Alexandria*, 1 *Pet.* 46; *Anus v. Smith*, 16 *Pet.* 303; *Jay v. Almy*, 1 *Woodb. & M.* 262; *Black. Comm.* 295; 1 *Pick.* 371; 2 *Mass.* 113; *Honer v. Brown*, 16 *How. U.S.* 354.

52. Ejectment.—In ejectment, upon disclaimer of possession or interest in the property, a judgment for the plaintiff cannot be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit. (*Noe v. Card*, 14 *Cal.* 567; *Pioche v. Paul*, 22 *Cal.* 105.) When the evidence, and the presumption reasonably arising therefrom, tend to prove the facts in controversy, a nonsuit is improper. The case should be submitted to the jury. (*De Ro v. Cordes*, 4 *Cal.* 117.) A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint. (*McKee v. Greene*, 31 *Cal.* 418.) It will not be granted where there is some evidence tending to show prior possession. (*Sharon v. Davidson*, 4 *Nev. Rep.* 416.) It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 9 *Cal.* 268.

53. Motion.—A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the Court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case. (*People v. Banvard*, 27 *Cal.* 474.) Where it is made without stating the grounds, it is not error to overrule it. *Kiler v. Kimball*, 10 *Cal.* 267.

54. When and When not Granted.—Nonsuit not proper where there is any evidence tending to prove the indebtedness. (*Cravens v. Dewey*, 13 *Cal.* 40; *Williams v. Norton*, 3 *Kans.* 295; *Clark's Adm'x v. Hannibal R.R.*, 36 *Mo.* 202.) If the evidence of the plaintiff will not authorize a jury to find a verdict for him, or if the Court would set it aside if so found as contrary to evidence, it is the duty of the Court to nonsuit the plaintiff. (*Mateer v. Brown*, 1 *Cal.* 221.) So, if he fails to offer any evidence. (*Kohler v. Wells*, 26 *Cal.* 607; *Langhoff v. Milwaukee R.R.*, 19 *Wis.* 489.) When a plaintiff should not be nonsuited for the non-payment of the costs of two former suits for the same cause of action, *Janeway v. Skerritt*, 1 *Vroom (N.J.)* 97.

JUDGMENT BY DEFAULT.

*No. 1023.**Entry of Default by Clerk.*

In this action, the defendant, C. D., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant C. D. in the premises is hereby duly entered according to law.

Attest my hand, and the seal of said Court, this day of, 18...

[SEAL.]

[SIGNATURE.]

55. Clerk's Duty.—The entry of a default in a case authorized by law is a ministerial act to be performed by the Clerk, and the disqualification of the Judge of the Court to try the cause does not disqualify the Clerk for the performance of this duty. (*People v. Carillo*, 35 *Cal.* 37.) In certain cases for the collection of taxes (*Stat. of Cal.* 1863-4, p. 399), no entry of default by the Clerk is necessary, but a default is deemed made on the failure of defendants to appear and plead within the time prescribed by law. (*People v. Carillo*, 35 *Cal.* 37.) When the law declares what the judgment shall be, a judgment on default is not the judgment of the Clerk. (*Harding v. Cowing*, 28 *Cal.* 212.) The Clerk derives all his power in entering a default without an order of the Court from the Statute, and when he enters a default it must appear that all the facts existed which the law requires to authorize it. *Providence Toll Co. v. Prader*, 32 *Cal.* 634.

56. Default Admits.—A default admits only the facts alleged in the complaint. (*Harlan v. Smith*, 6 *Cal.* 173; *McGregor v. Shaw*, 11 *Id.* 47.) So, where title as administrator is averred. (*Curtis v. Herick*, 14 *Id.* 117.) So of title in ejectment. (*Smith v. Billett*, 15 *Id.* 23.) A default on a complaint containing special counts, defectively stated, and also the common counts in *assumpsit*, properly stated, will

support a judgment—the default being a confession of the indebtedness for the causes and on the accounts alleged in the complaint. (*Hunt v. City of San Francisco*, 11 *Cal.* 250.) Where the complaint avers title as administrator, a default admits it. *Curtis v. Herrick*, 14 *Cal.* 117.

57. Default Cures.—A default cures a defective allegation of fact, but not an entire absence of any allegation. *Hentsch v. Porter*, 10 *Cal.* 555; *Barron v. Frink*, 30 *Id.* 489; *People v. Rains*, 23 *Id.* 137.

58. Order of Court Required.—Where a frivolous demurrer is filed, and no leave is asked to file an answer, it is not error for the Court to enter a default of judgment upon overruling the demurrer. (*Seale v. McLaughlin*, 28 *Cal.* 668.) If an answer is filed raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the Court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint. *Abbott v. Douglass*, 28 *Id.* 295; see *Peabody v. Phelps*, 9 *Id.* 224.

No. 1024.

Judgment by Default.

[TITLE.]

In this action, the defendant, C. D., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint herein, and the legal time for answering having expired, and the default of the said defendant in the premises having been duly entered according to law: now, at this day, on application of E. F., attorney for said plaintiff:

IT IS ORDERED that judgment be entered herein against the said defendant, C. D., as well as against the defendant E. D., not served with process, in accordance with the prayer of said plaintiff's complaint on file herein.

Wherefore, by reason of the law and the premises

aforesaid, it is ordered and adjudged, that A. B., plaintiff, do have and recover of and from the said defendants, C. D. and E. D., the sum of dollars, with interest thereon, at the rate of per cent. per month, from the date hereof until paid; together with said plaintiff's costs and disbursements incurred in said action, amounting to the sum of dollars.

And it is further ordered and adjudged, that said plaintiff do have execution against the separate property of the defendant, C. D., as well as against the joint property of all the said defendants.

Judgment rendered on the day of ,
18...

59. Against whom Entered.—A judgment by default may as well be taken against an administrator as any other party. (*Chase v. Swain, Administrator*, 9 *Cal.* 130.) Against a municipal corporation as well as against a private person. (*Hunt v. City of San Francisco*, 11 *Id.* 250.) Where the action is against defendants severally liable, a portion only being served with process, the Clerk can, on application of plaintiff, enter judgment, upon default, against the parties served, without regard to the other parties named in the complaint. (*Kelly v. Van Austin*, 17 *Id.* 564.) But otherwise if they are jointly liable. (*Id.*) If persons are served with summons, who are not named in the complaint, either by real or fictitious names, it is error to render judgment against them by default. *Lamping v. Hyatt*, 27 *Id.* 102.

60. Effect of.—Where the summons has been duly served, a judgment by default amounts to a confession on the part of the defendants of all the material facts in the complaint. (*Rowe v. Table Mountain Water Co.*, 10 *Cal.* 441.) The fact that one defendant who suffered judgment by default is not estopped as to an issue made by the other defendants, upon which they succeeded, does not prevent the judgment upon this issue from being an estoppel between the plaintiff and the defendants who pleaded it. (*Jackson v. Lodge*, 36 *Id.* 28.) In an action upon a joint contract, if one be defaulted and the other go to

trial on a plea that is peculiar to himself, a judgment in his favor will not discharge the defaulted defendant; otherwise if the matter pleaded be a defense common to both defendants. *Swanzy v. Parker*, 50 *Penn.* 441.

61. Entry of.—The clerk of a court, in entering a judgment after default, acts in a mere ministerial capacity, and cannot render a judgment granting any relief beyond that warranted by the facts stated in the complaint. (*Gray v. Palmer*, 28 *Cal.* 416; *Wallace v. Eldridge* (No. 1), 27 *Cal.* 495; *Kelly v. Van Austin*, 17 *Cal.* 564; *Wilson v. Cleveland*, 30 *Cal.* 192; *Leese v. Clark*, 28 *Id.* 33.) A judgment entered by the Clerk, upon default, for a sum greater than is demanded in the prayer of the complaint and specified in the summons, is not void but is simply erroneous, and may be enforced until modified on motion or on appeal. *Bond v. Pacheco*, 30 *Cal.* 531.

62. Errors, how Reviewed.—There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury; and in the former, as well as the latter case, the error may be corrected on appeal. (*Stevens v. Ross*, 1 *Cal.* 94.) Judgment by default, before the expiration of the full time, will be reversed on appeal. (*Burt v. Scranton*, 1 *Id.* 416.) If the summons be radically defective, it will not support a judgment by default. (*People v. Woodlief*, 2 *Id.* 241.) So, where the record shows that the defendant has not been legally served with process. (*Joyce v. Joyce*, 5 *Cal.* 449.) A notice in summons that a money judgment would be taken will not support a judgment for fraud. (*Porter v. Hermann*, 8 *Cal.* 519.) Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can be over a general demurrer. (*Abbe v. Marr*, 14 *Cal.* 210.) A judgment rendered upon a complaint radically defective may be treated as a nullity. *Reynolds v. Harris*, 9 *Id.* 338.

63. Proof, when Required.—See (*Tuolumne Redemption Co. v. Patterson*, 18 *Cal.* 415; *Lick v. Stockdale*, *Id.* 219.) See exceptions under subdivisions two and three of section one hundred and fifty. A judgment in ejectment awarding damages, rendered on a default, will not be reversed because it does not appear that the Court examined witnesses upon the question of damages. *Dimick v. Campbell*, 31 *Cal.* 238.

64. Relief Granted.—If judgment is rendered in favor of

plaintiff, by default, the Court cannot grant any greater relief than is demanded in the prayer of the complaint and specified in the summons. (*Cal. Pr. Act*, § 147; *Lamping v. Hyatt*, 27 *Cal.* 102; *Gage v. Rogers*, 20 *Id.* 91; *Lattimer v. Ryan*, *Id.* 628; *Raun v. Reynolds*, 11 *Id.* 19; *Parrott v. Den*, 34 *Id.* 79.) If the prayer for judgment asks for interest to accrue after the complaint is filed, and neither the prayer nor summons mention the rate of interest, the Clerk should not render judgment for a rate greater than ten per cent. per annum. (*Lamping v. Hyatt* 27 *Cal.* 102; *Gautier v. English*, 29 *Cal.* 165.) Interest is to be allowed on cash advances as a matter of law. (*Field v. Burnam*, 3 *Bush.* 518.) As to interest generally, as a part of the relief granted, see (*Skillman v. Lachman*, 23 *Cal.* 199; *Estate of Isaacs*, 30 *Cal.* 105; *Bibend v. L. and L. F. and L. Ins. Co.*, *Id.* 78.) In an action in Massachusetts on a note made payable in New York, interest at the legal rate of the former State only will be allowed. *Ayer v. Tilden*, 15 *Gray*, 178.

65. Waiver of Default.—An acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, is a waiver of the default. *Hestres, Administrator, v. Clements*, 21 *Cal.* 425.

66. When to be Entered.—If no answer has been filed with the Clerk of the Court within the time specified in the summons, or such further time as may have been granted, in an action arising upon contract for the recovery of money or damages only, the Clerk, upon application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant. In other actions, the Clerk shall enter the default of the defendant; and thereafter the plaintiff may apply, at the first or any subsequent term of the Court, for the relief demanded in the complaint. Where the service of the summons was by publication, the plaintiff, upon the expiration of the time designated in the order of publication, may, upon proof of the publication, and that no answer has been filed, apply for judgment; but proof of the demand in such case shall be required. *Cal. Pr. Act*, § 150.

SETTING ASIDE JUDGMENT.

67. Grounds of Motion.—A party against whom an unjust judgment has been obtained through accident, mistake or fraud, may,

after the adjournment of the term at which judgment was rendered, and where no want of diligence is imputable to him in seeking relief, maintain an equitable action to set aside the judgment. (*Bibend v. Kreutz*, 30 *Cal.* 109.) In cases of fraud in obtaining the judgment, the party aggrieved must proceed by a bill to impeach the original decree for fraud, etc. (*Robb v. Robb*, 6 *Cal.* 21.) Insufficient grounds. (See *Markley v. Rand*, 12 *Cal.* 275; *Alderson v. Bell*, 9 *Cal.* 315.) If a judgment is erroneous, the defendant has his remedy by appeal; if void upon its face, he has in addition his remedy by motion, at any time, in the Court by which the judgment was rendered. *Chipman v. Bowman*, 14 *Cal.* 157; *Logan v. Hillegass*, 16 *Id.* 200; *Bell v. Thompson*, 20 *Id.* 706; *Sanchez v. Carriaga*, 31 *Id.* 170; cited in *Murdock v. De Vries*, *Cal. Sup. Ct., Jul. T.*, 1869.

68. Jurisdiction.—All courts having chancery jurisdiction have power to set aside a judgment improperly obtained. (*The People v. Lafarge*, 3 *Cal.* 130.) A party is not confined to his remedy by statute, but may resort to a court of equity for relief against a judgment obtained by fraud or surprise. (*Carpentier v. Hart*, 5 *Cal.* 406.) The assistance of equity to set aside a judgment cannot be invoked in a distinct action, so long as the remedy by motion in the original case exists. *Bibend v. Kreutz*, 20 *Cal.* 109.

69. Motion, when to be Made.—The statutory remedy, by motion before the Court rendering the judgment, is only available during the term at which it is rendered, and to hold this remedy exclusive would often result in a denial of the most obvious justice. (*Bibend v. Kreutz*, 20 *Cal.* 109; *Hutchinson v. Bours*, 13 *Cal.* 50.) During the term at which a judgment was rendered, a district court may perhaps, even without a statement or affidavits, upon motion of a party injured, amend or set aside an erroneous judgment; but to continue full and complete jurisdiction in the court over the case beyond the term, some order must be made or proceedings taken in accordance with Statute. (*State v. First Nat. Bk.*, 4 *Nev.* 358.) A court will not be permitted, after a lapse of a term, to open a judgment upon motion, and render a new judgment. (*Morrison, Adm'r of Ramirez, v. Dapman*, 3 *Cal.* 255; *Bell v. Thompson*, 19 *Cal.* 706; *Suydam v. Pitcher*, 4 *Id.* 280; *Shaw v. McGregor*, 8 *Id.* 521; *Casement v. Ringgold*, 28 *Cal.* 338.) After the adjournment of the term, the Court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time, except in the single case provided by statute,

where the summons has not been served, in which the party is allowed six months to move to set the judgment aside. (*Carpentier v. Hart*, 5 *Cal.* 406.) Five months is now allowed. (See *Cal. Pr. Act*, § 68.) In New York, two years is allowed for opening up a judgment, and no more. (*Hendricks v. Carpentier*, 2 *Robt.* 625.) But not a limitation where summons was not served. *Weeks v. Merritt*, 5 *Id.* 610.

70. Parties not Concluded by the Record.—In a direct proceeding in the same action to set aside a judgment, under Section sixty-eight of the Practice Act, the parties are not concluded by the record in any respect; on the contrary, they are allowed to show the true facts of the case by any competent evidence *alita*, if the question had arisen collatérally. *McKinley v. Tuttle*, 34 *Cal.* 235.

No. 1025.

Notice of Motion to Set Aside a Judgment by Default.

[TITLE.]

[ADDRESS.]

Take notice, that upon the affidavit, a copy of which is herewith served, I will move said Court, at the City Hall [*or other place, designating it*], on the day of, 18 . . ., at the hour of o'clock A.M. of said day, or as soon thereafter as counsel can be heard, that the judgment entered by default against the defendant in this action, and all subsequent proceedings therein, be set aside for irregularity [*giving the reason in full is the better practice*].

[DATE.]

[SIGNATURE.]

71. Answer to the Merits.—When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the Court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to

answer to the merits of the original action. (*Cal. Pr. Act*, § 68.) The better practice is to prepare and exhibit to the Court the defendant's answer at the hearing of a motion to set aside a default. *Bailey v. Taaffe*, 29 *Cal.* 422.

72. Discretion of Court.—The granting or refusing a motion to set aside a default based upon affidavits is a matter within the proper discretion of the Court, and unless that discretion has been abused the appellate courts will not interfere. (*Woodward v. Backus*, 20 *Cal.* 137; *Roland v. Kreyenhagen*, 18 *Cal.* 455; *Howe v. Independent Co.*, 27 *Cal.* 72; *Mulholland v. Heyneman*, 19 *Cal.* 605.) Although an order of the court below setting aside or refusing to set aside a judgment by default rests much in the discretion of the Court, and will not be disturbed by the appellate court unless plainly erroneous, yet the discretion of the court below is not a mental discretion, to be exercised *ex gratia*, but is a legal discretion, to be exercised in conformity with the law. *Bailey v. Taaffe*, 29 *Cal.* 422.

74. Motion, when to be Made.—A motion may be made to set aside a default entered by the Clerk, at any time before final judgment is rendered in the action, notwithstanding the Court had adjourned for the term at which the default was entered, before the motion is made to vacate it. *Wilson v. Cleveland*, 30 *Cal.* 192.

75. Motion will be Refused.—A judgment by default should not be set aside on the ground of excusable neglect, because the preparation of the answer required more time than ordinary cases, and during a portion of the time the attorney was absent from town. *Bailey v. Taaffe*, 29 *Cal.* 422; see, also, *People v. O'Connell*, 23 *Cal.* 281; and *Parrott v. Den*, 34 *Cal.* 79; *Haight v. Green*, 19 *Cal.* 113.

76. On Terms.—The Court may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. An order to release a party from a judgment taken against him by default, under the sixty-eighth section of the Practice Act, should only be granted upon the terms, as a condition precedent, of payment of all costs accruing to the adverse party to the time of service and filing of notice of motion thereof. (*Howe v. Independent Co.*, 29 *Cal.* 72; *Bailey v. Taaffe*, 29 *Cal.* 422; *Leet v. Grants*, 36 *Cal.* 288.) Where a judgment is set aside, under the sixty-eighth section of the Practice Act, and a party permit-

ted to come in and defend, he must be compelled to pay costs. (*Roland v. Kreyenhagen*, 18 *Cal.* 455.) Where a motion to set aside judgment is granted "on payment of all costs," the judgment remains in force until the costs are paid. *Gregory v. Haynes*, 21 *Cal.* 443.

77. Right to Move.—When, for any cause satisfactory to the Court, or the Judge at chambers, the party aggrieved has been unable to apply for relief sought during the term at which such judgment, order, or proceeding complained of was taken, the Court, or the Judge at chambers in vacation, may grant the relief, upon application made within a reasonable time, not exceeding five months after the adjournment of the term. *Cal. Pr. Act*, § 368.

No. 1026.

Affidavit to Set Aside Judgment by Default.

[TITLE.]

[VENUE.]

C.D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above entitled action.

II. The summons and complaint in this action were served on me on the day of, 18...

III. Through mistake [inadvertence, surprise, or neglect, as the case may be] of, [state the circumstances,] I was prevented from appearing and answering in this action.

IV. I further say that I have fully and fairly stated the fact of the case to G.H., my counsel, who resides at No. Street, in the City of, and after such statement I am by him advised that I have a good and substantial defense on the merits of the action, as I am advised by my said counsel, and verily believe to be true.

[SIGNATURE.]

[*Jurat.*]

78. By whom Made.—An affidavit on a motion to set aside a default should be made by the defendant, unless good reason exists for having it made by some one else. (*Bailey v. Taaffe*, 29 *Cal.* 422.) By purchaser under decree, see (*Boggs v. Hargrave*, 16 *Cal.* 559.) A motion to set aside a judgment, and for leave to answer, will be overruled if there is no affidavit of merits. (*Parrott v. Den*, 34 *Cal.* 79; *Parrott v. Mahoney*, 21 *Cal.* 305; *Woodward v. Backus*, 20 *Cal.* 137; *People v. Rains*, 23 *Cal.* 128.) An affidavit of defense, filed upon motion to set aside a default, should set forth the facts relied upon, so that the Court can judge of the merits of the defense. *Florez v. Uhrig's Administrator*, 35 *Mo.* 517.

79. Diligence must be Shown.—A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the Court for the relief contemplated, or his right to relief will be lost. An unexplained delay of seven years in making the application will justify the Court in refusing to enforce the stipulation. (*Reese v. Mahoney*, 21 *Cal.* 305.) As to diligence generally, see *People v. Frisbie*, 26 *Cal.* 137; *Lewis v. Rigney*, 21 *Id.* 268; *Riddle v. Baker*, 13 *Cal.* 304.

80. Form of Affidavit.—As to insufficiency of affidavit, consult (*Bailey v. Taaffe*, 29 *Cal.* 422; *People v. Rains*, 23 *Cal.* 128; *Elliott v. Shaw*, 16 *Cal.* 377; *People v. Lafarge*, 3 *Cal.* 130.) An affidavit on motion to vacate a judgment by default, under the sixty-eighth section of the Practice Act, must show: *First*, That the default occurred through mistake, inadvertence, surprise, or excusable neglect; and, *Second*, That the defendant has a meritorious defense. (*Bailey v. Taaffe*, 29 *Cal.* 422.) An affidavit by the defendant that he was under the impression, when he retained counsel in a cause, that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; that he was quite ill at the time, and did not as carefully note the time as he otherwise would, is insufficient to open a judgment by default. *Elliott v. Shaw*, 16 *Id.* 377.

*No. 1027.**Judgment by the Court.*

[TITLE.]

This cause came on regularly for trial on the day of, 18..., E. F., Esq., appearing as counsel for the plaintiff, and G. H., Esq., for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting, without a jury, whereupon J. K. and L. M. were examined as witnesses on the part of the plaintiff, and N. O. and P. Q. were examined as witnesses on the part of the defendant, and the evidence being closed, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon, the Court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered and adjudged, that A. B., the plaintiff, do have and recover of and from C. D., the defendant, the sum of dollars, with interest thereon at the rate of per cent. per month, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of dollars; and that said sum of dollars and said interest be paid by said defendant in gold coin of the United States.

Judgment rendered, 18...

81. Conclusiveness of Judgment.—A judgment is of no force except between the parties and privies. (*Beckett v. Selover*, 7 Cal. 228.)

Except in some cases for specific purposes. (*Gregory v. Haynes*, 13 *Cal.* 494.) See, also, *Davidson v. Dallas*, 8 *Cal.* 227; see 11 *Cal.* 678; see *Kittridge v. Stevens*, 16 *Cal.* 381.) One in possession of land, who is neither a party nor privy to a judgment for the recovery of possession of it, is neither affected by the judgment as an instrument of evidence, nor can be dispossessed by virtue of a writ issued upon it. (*Le Roy v. Rogers*, 30 *Cal.* 229.) On a trial by the Court it may and should decide the whole case. 1 *Bosw.* 281; *Van Valen v. Lapham*, 13 *How. Pr.* 246.

82. In Equity.—The Court may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves. (*Cal. Pr. Act*, § 145; *N.Y. Code*, § 274.) Where a decision is made in a suit in equity upon any particular subject matter, the rights of all persons whose interests are immediately connected with that decision, and affected by it, should be provided for. (*McPherson v. Parker*, 30 *Cal.* 455.) Equity has jurisdiction to vacate a judgment fraudulently altered, so as to include a defendant not served with process and not originally included in the judgment. (*Chester v. Miller*, 13 *Cal.* 558.) An infant defendant is as much bound by the decree in equity as a person of full age. (*Joyce v. McAvoy*, 31 *Cal.* 273.) And it is questionable under our practice whether he is entitled to have a day given in the judgment to show cause against it. *Carpentier v. City of Oakland*, 30 *Cal.* 439.

83. In Partition.—A judgment in an action for partition is binding and conclusive, as to title, upon all the parties who are served with summons or appear, and a bar to a new action. (*Morenhout v. Higuera*, 32 *Cal.* 289.) But such judgment and partition shall not affect tenants for years less than ten, to the whole of the property which is the subject of the partition. (*Cal. Pr. Act*, § 279.) The effect of a judgment in partition is to be determined by our Statute, and not by the common law. (*Morenhout v. Higuera*, 32 *Cal.* 289.) The order of a Court for a partition of lands, or for a sale, in case a partition cannot properly be made, is not a final judgment, in an action for partition. They are to be succeeded by a judgment confirming the partition sale. *Hastings v. Cunningham*, 35 *Cal.* 549.

84. Replevin.—In replevin, a judgment for the plaintiff, in order to hold the sureties on the undertaking, must be in the alternative. See *Cal. Pr. Act*, §§ 104, 177, 200, 201; *Nickerson v. Chatterton*, 7

Cal. 568; *Dorsey v. Manlove*, 14 *Cal.* 555; see *Edgar v. Gray*, 5 *Cal.* 267; *Turner v. Billagram*, 2 *Cal.* 522; *Farrell v. Jackson*, 28 *Cal.* 105; *O'Connor v. Blake*, 29 *Cal.* 312.

85. On the Merits.—In every case other than those mentioned in the Section 148, the judgment shall be rendered on the merits. (*Cal. Pr. Act*, § 149.) Where an answer is filed, the Court may grant any relief consistent with the case made by the complaint, and embraced within the issue. (*Savings and Loan Society v. Thompson*, 32 *Cal.* 347.) The provisions of this section apply to *mandamus and quo warranto*. *People v. Board of Supervisors, San Francisco Co.*, 27 *Cal.* 655.

86. On Report of Referee.—A *mandamus* lies to compel the judge of a district court to enter judgment on the report of a referee. (*Russell v. Elliott*, 2 *Cal.* 246.) A judgment on the report of a referee must be construed by the report. *Mason v. Ring*, 2 *Abb. Pr. (N.S.)* 322; *Commercial Bank of Albany v. Ten Eyck*, 50 *Barb.* 9.

No. 1028.

Decree of Divorce.

[TITLE.]

This cause having been brought on to be heard this day of, 18 . . , upon the complaint of the plaintiff above named, and the answer and cross complaint of the defendant above named, and upon the proofs taken in said action, and upon the report of L.M., the Court Commissioner of this court and referee in this cause, to whom it was referred, to take proofs of the facts set forth in the complaint and answer and cross complaint respectively, and to report the same to the Court, and the said referee having taken the testimony by written questions and answers, and reported the same to the Court, from which it appears that none of the material allegations of the complaint, except those

expressly admitted in the answer, are sustained by testimony, and that all the material averments of the answer and cross complaint are sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency; that said matter so alleged and proved in behalf of defendant are sufficient in law to entitle the defendant to the relief prayed for in his answer and cross complaint; that plaintiff was a resident of this City and County at the time of commencing this suit, and that both plaintiff and defendant were residents of this State for a period of six months immediately prior thereto; on motion of G.H., counsel for the defendant:

IT IS ORDERED, adjudged, and decreed, that the Court, by virtue of the power and authority therein vested, and in pursuance of the Statute in such case made and provided, does order, adjudge and decree, that the marriage between the said plaintiff, A.B., and the said defendant, C.D., be dissolved, and the same is hereby dissolved accordingly, and the said parties are, and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof; and it is further ordered, adjudged, and decreed, that the defendant C.D. have, and he is hereby awarded the sole charge, control and custody of R.S. and T.U., the children issue of said marriage, and mentioned in said answer and cross complaint, and, that the said plaintiff surrender the said children to the said defendant.

No. 1029.

Decree of Foreclosure and Sale.

[TITLE.]

I. This cause having this day been brought on to be heard upon the complaint filed therein, taken as confessed by the defendant C.D. (whose default for not answering thereto has been duly entered), and upon the answers filed thereto by the defendants A. D. and E. P., and upon due proof of the filing of notice of the pendency of this action, containing the names of the parties to and the object of the action, and a description of the property affected thereby, upon the . . . day of, 18.. [*the time of filing said complaint*], in the office of the County Recorder of the County of, where said property is situated, and recording the same in said Recorder's Office, and upon the report of R. S., Court Commissioner of this Court, which report is filed herein and is hereby confirmed, and the Court having heard the proofs necessary to enable it to render judgment herein; and it appearing to the Court from said report that there is now due to the plaintiff, from the said defendant C.D., for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of dollars, which sum is to draw and bear interest from the date hereof, at the rate of per cent. per month [*or annum*], and that all the allegations in the said plaintiff's complaint contained are true: Now, on motion of E. F., of counsel for the plaintiff:

II. IT IS ADJUDGED AND DECREED: That all and singular the mortgaged premises mentioned in the said com-

plaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest and costs in the suit and expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of the Sheriff of the City and County of, where said mortgaged premises are situate; that said sale be made in said City and County; that the said Sheriff give public notice of the time and place of such sale, according to the course and practice of the Court and the law relative to sales of real estate under execution; and that the plaintiff or any of the parties to this suit may become the purchaser at such sale; and that the said Sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale.

III. That the said Sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff or his attorney, out of said proceeds, his costs in this suit, taxed at dollars; and the sum of dollars fixed by said mortgage and allowed by the Court as counsel fee of foreclosure, with interest thereon from this date, at the rate of per cent. per month [*or annum*], and also the amount so found due as aforesaid to either, with interest thereon at the rate of per cent. per month [*or annum*], from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same.

IV. That the defendant and all persons claiming or to claim from or under him, and all persons having liens subsequent to said mortgage, by judgment or de-

cree, upon the land described in said mortgage, and or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the Recorder as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of the said Sheriff's deed.

V. And it is further adjudged and decreed: That the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the Sheriff's deed for such premises, or any part thereof.

VI. And it is further adjudged and decreed: That if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff as above stated, with the interests and costs and expenses of sale, as aforesaid, the Sheriff specify the amount of such deficiency and balance due the plaintiff in his return of said sale, and that, on the coming in of said return, a judgment of this Court shall be docketed for such balance against the defendant C. D., and that the defendant C. D., who is personally liable for the

payment of the debt secured by the said mortgage, pay to the said plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of per cent. per month [*or* annum], from the date of said last mentioned return and judgment; and that the plaintiff have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the complaint filed in this action, are as follows, to wit: [*describe it.*]

R. Q.

District Judge Judicial District.

87. Decree must Contain.—All that a decree in a suit to foreclose a mortgage should contain, is a statement of the amount due to the plaintiffs, a designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, *be sold* according to law, and the proceeds applied to the payment of the expenses of sale, the costs of the action and the debt. Nothing further is required. (*Lewiston v. Swan*, 33 *Cal.* 480.) As to the substance of a decree of foreclosure, consult *Raun v. Reynolds*, 11 *Id.* 14; *Taggart v. San Antonia*, 18 *Id.* 460; *Boggs v. Hargrave*, 16 *Id.* 559; *Pechaud v. Rinquet*, 21 *Id.* 76; *San Francisco v. Lawton*, *Id.* 589; and the early cases of *Moore v. Reynolds*, 1 *Id.* 251; and *Harlan v. Smith*, 6 *Id.* 174.

88. Effect of Decree.—The decree concludes the rights of all parties to the action. *Montgomery v. Middlemiss*, 21 *Cal.* 103; *San Francisco v. Lawton*, 18 *Id.* 465.

89. Personal Judgment.—In this State, parties are at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment, and apply after sale for the ascertainment of any deficiency, and execution for the same; or

they may take a formal judgment for the amount due in the first instance. (*Cal. Pr. Act*, § 246; *Rowland v. Leiby*, 14 *Cal.* 156; *Englund v. Lewis*, 25 *Id.* 348; *Chapin v. Broder*, 16 *Id.* 403.) But a personal judgment is not a lien until after sale and deficiency. (*Culver v. Rogers*, 28 *Id.* 520.) Section two hundred and forty-six of the Practice Act limits the lien of a foreclosure, judgment, or decree, whatever its form, to the mortgaged property, until it is exhausted, and there can be no judgment lien upon other property until a deficiency is duly ascertained and docketed. *Weil v. Howard*, 4 *Nev.* 384.

90. Relief from Erroneous Decree.—Courts of equity are ever ready to grant relief from their decrees. (*Goodenow v. Ewer*, 16 *Cal.* 461.) As to how relief may be sought in such cases, consult *Boggs v. Hargrave*, 16 *Id.* 559; *Phelan v. Olney*, 6 *Id.* 478; *Raun v. Reynolds*, 15 *Id.* 468; *Burton v. Lies*, 21 *Id.* 87; and *Leviston v. Swan*, 33 *Id.* 480.

No. 1030.

Decree in Actions to Quiet Title.

[TITLE.]

This cause having been regularly called and tried by the Court, and the findings of fact and conclusions of law, and the decision thereon in writing having been duly rendered by the Court, which are now on file in this cause, wherein judgment was awarded in favor of A. B., plaintiff, against all of the defendants, and for costs against such of the defendants only as have answered contesting the plaintiff's rights in the premises, on motion of E. F., plaintiff's attorney:

It is now, therefore, hereby ORDERED, ADJUDGED, AND DECREED, that the plaintiff have judgment, as prayed for in his complaint herein, against the defendants, and each and all of them, that all adverse claims of the defendants, and each of them, and all persons claiming or to claim said premises, or any part thereof, through or under

said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff be and he is hereby declared and adjudged to be the true and lawful owner of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them, who are hereby perpetually estopped from setting up any claims thereto, or any part thereof. Said premises are bounded and described as follows: [*here describe the premises.*]

And it is hereby further ORDERED, ADJUDGED, AND DECREED, that the plaintiff do have and recover his costs, hereby taxed at dollars, against the following named defendants:

[DATE.]

[SIGNATURE.]

91. Effect of Decree.—If plaintiff prevail in an action to quiet title, a decree inserted in the judgment, enjoining defendant from making any further contest on plaintiff's title, even if not strictly correct, does not injure defendant. Such decree does not preclude defendant from availing himself of an acquired title. (*Reed v. Calderwood*, 32 *Cal.* 109.) As to effect of decree, see *Marshall v. Shafter*, 32 *Id.* 176.

No. 1031.

Judgment on Verdict.

[TITLE.]

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons are regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant

were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and, being called, answered to their names, and say they find a verdict for the plaintiff.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged, that said plaintiff have and recover from said defendant the sum of dollars, with interest thereon at the rate of per cent. per month, from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of dollars.

Judgment rendered, 18...

1

92. Entry by Clerk.—When trial by jury has been had, judgment shall be entered by the Clerk in conformity to the verdict, within twenty-four hours, unless a stay has been granted. (*Cal. Pr. Act*, § 197.) Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for new trial. (*Hutchinson v. Bours*, 13 *Cal.* 51.) If the verdict of the jury fails to find the lien, the Court cannot render a judgment essentially different from the verdict, and the judgment so far will be reversed. (*Walker v. Hauss-Hijo*, 1 *Cal.* 186.) The Court will presume after a verdict that facts imperfectly alleged in a complaint have been proved, but it will not presume that a *material* fact, not at all stated, has been proved. (*Barron v. Frink*, 30 *Cal.* 486.) To an attachment-execution the defendant pleaded payment, and also a special plea that an authorized committee of the plaintiff, a corporation, had received a sum of money in satisfaction of the judgment; no question was reserved. The jury found for the defendant. The Court entered judgment, notwithstanding the verdict. *Held*, to be error. (*Conrad v. Commercial Ins. Co.*, 54 *Penn.* 373.) If the second plea was immaterial, a verdict on it amounted to nothing; it should have been met by a demurrer, and the plea of payment disposed of in the usual manner. *Id.*

*No. 1032.**Satisfaction of Judgment.*

[TITLE.]

For and in consideration of the sum of dollars, to me paid by, the defendant in the above entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered in said Court in the said action, on the day of, A.D. 18..., in favor of, the plaintiff in the said action, and against the said defendant, for the sum of dollars, with interest thereon from the day of, A.D. 18..., at the rate of per cent. per annum until paid, together with said plaintiff's costs and disbursements, amounting to the sum of dollars, and recorded in Book of Judgments, at page And I hereby authorize the Clerk of said Court to enter satisfaction of record of said judgment in the said action.

E. F.,

[DATE.]

Attorney for Plaintiff.

93. By Levy, under Execution.—A levy, under execution, on sufficient property to satisfy it, is a satisfaction of the judgment. (*People v. Chisholm*, 8 *Cal.* 30; see, also, 23 *Id.* 94; see *Cal. Pr. Act*, § 208.) The return of a sheriff indorsed on an execution placed in his hands for collection, that the execution is satisfied by promissory notes received for the amount due on it, is not evidence of the satisfaction of the judgment on which it was issued, nor can it be admitted in evidence as tending to prove a satisfaction of the same. (*Mitchell v. Hockett*, 25 *Cal.* 542.) The plaintiff in an execution may accept of promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the Sheriff's certificate. *Id.*

94. Part Payment.—A payment of part of the amount due upon a money judgment, under an agreement that it shall operate as satisfaction in full, will not discharge the judgment. (*Deland v. Hiatt*, 27 *Cal.* 611.) The contrary is now, however, the rule. (See *Stat. of Cal.* 1867-8, p. 31.) Yet a memorandum in writing must be made of the transaction.

No. 1033.

Memorandum of Costs and Disbursements.

[TITLE.]

DISBURSEMENTS:

Sheriff's Fees	\$15 00
Clerk's Fees	20 00
Witness' Fees	46 00
[Names of witnesses must be given.]	
Referee's Fees	50 00
Notary Fees	10 00
	141 00

State of California,
City and County of } ss.

E.F., being duly sworn, deposes and says:

I. That he is one of the attorneys for the plaintiff in the above entitled action, and, as such, is better informed relative to the above costs and disbursements than the said plaintiff.

II. That the items in the above memorandum contained are correct, to the best of said affiant's knowledge and belief, and that the said disbursements have been necessarily incurred in the said action.

[SIGNATURE.]

[*Jurat.*]

95. Amendment of Memorandum.—Under Section 68 of the California Practice Act, the Court may allow amendment of a bill of costs and the affidavit accompanying it. *Burnham v. Hays*, 3 *Cal.* 115.

96. Affidavit.—The affidavit by the attorney of the party, accompanying the bill of costs, is good under the Statute. *Id.*; *Burnham v. Hays*, 3 *Cal.* 115.

97. Attorney's Fees.—The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties. But there shall be allowed to the prevailing party in any action in the Supreme Court, District Courts, and County Courts, his costs and necessary disbursements in the action or special proceeding in the nature of an action. (*Cal. Pr. Act*, § 494; *N.Y. Code*, § 303.) An attorney has no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services. Such lien extends only to costs given by statute. (*Ex parte Kyle*, 1 *Cal.* 331.) A lien of the attorney for his costs was settled by this Court in (*Ex parte Kyle*, 1 *Cal.* 331; and *Mansfield v. Dorland*, 2 *Cal.* 507;) and not allowed. *Russell v. Conway*, 11 *Cal.* 103.

98. Filing Memorandum.—See *Gray v. Gray*, 11 *Cal.* 341; *Burnham v. Hays*, 3 *Cal.* 115; *Gregory v. Haynes*, 21 *Cal.* 443; *Ex parte Burrill*, 24 *Cal.* 350; *Chapin v. Broder*, 16 *Cal.* 403.

99. Returning Costs.—If items are included in the bill of costs which are not properly taxable, it affords no just ground for refusing to issue an execution or recalling one, but the remedy is by motion to re-tax. (*Meeker v. Harris*, 23 *Cal.* 285; see *Burnham v. Hays*, 3 *Cal.* 115.) If the Court adds to the judgment the costs of the prevailing party after the time for filing the same has expired, and after an appeal has been perfected, the error can only be corrected by an appeal from the order. (*Jones v. Frost*, 28 *Cal.* 245.) Where costs on appeal to the Supreme Court are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution. *Chapin v. Broder*, 16 *Cal.* 403.

COSTS, WHEN ALLOWED.

100. Allowance, when Discretionary.—The allowance of costs rests in discretion of the Court of original jurisdiction. And

where, on sustaining a demurrer to a complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, the Court gave judgment for the defendant for full costs, *including a jury fee*: *Held*, no such abuse of discretion as to warrant interference by the Supreme Court. (*Harvey v. Chilton*, 11 Cal. 119.) The Supreme Court will only review the ruling of an inferior court in the matter of costs upon an appeal from the judgment in the case. *Votan v. Reese*, 20 Cal. 90.

IN PARTICULAR CASES.

101. Claim and Delivery.—In an action to recover possession of personal property, if the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right has seized and vested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant. *O'Conner v. Blake*, 29 Cal. 312; *Edgor v. Gray*, 5 Cal. 267.

102. Clerk's Duty.—After a judgment is entered and the record completed, the Clerk has no power to fill up the blank left for costs. His authority terminates with the entry of the judgment, and the Court alone, on motion to amend, is competent to relieve where costs are omitted. *Chapin v. Broder*, 16 Cal. 403; *McMillan v. Vischer*, 14 Cal. 241.

103. Costs are Part of Judgment.—Costs are included in and constitute a part of the judgment, and hence, though ascertained and adjudged by the Court after an entry of the judgment by the Clerk may have been made, yet the law considers such action of the Court as having preceded the final judgment. (*Lasky v. Davis*, 33 Cal. 667.) The Statute does not say that the costs shall in all cases become a lien, but that in that case—*i.e.* when they are included and specified in the judgment—they become a lien. *Hihn v. Parkhurst*, Cal. Sup. Ct., Oct. T., 1869.

104. Ejectment.—If the plaintiff in ejectment recovers judgment, he is entitled to the costs, although his recovery is for only a portion of the demanded premises, and the defendant recovers judgment for the residue. *Haven v. Dale*, 30 Cal. 547; cited in *Lawton v. Gordon*, 34 Cal. 36.

105. Foreclosure of Mortgage.—A mortgage contained a stipulation for all the costs of foreclosure, including counsel fees, not exceeding five per cent. of the amount due. *Held*, that the limitation of five per cent. is intended to apply to counsel fees alone, and that the complainant would be entitled to recover the whole of his costs by operation of the Statute and independent of any stipulation. *Gronfier v. Minturn*, 5 *Cal.* 492; *Luning v. Brady*, 10 *Cal.* 267.

106. In Equity.—Costs in equity are always in the discretion of the Court, and, whether granted or withheld, are but as incidents to, and no part of the relief sought. *Gray v. Dougherty*, 25 *Cal.* 282.

107. Injunction.—In this case, suit for damages to a mining claim and for an injunction, plaintiffs had judgment for one hundred dollars, and costs taxed at dollars, a perpetual injunction being granted also. After the judgment was entered, plaintiffs moved that costs for the trial be allowed. Motion denied, except as to the costs accrued by reason of the injunction granted. *Held*, that this is a case where the allowance of costs is in the discretion of the court below. *Esmond v. Chew*, 17 *Cal.* 336.

108. Money or Damages.—Costs of a suit form no part of the matter in dispute, and an appeal does not lie to the Supreme Court where the amount involved is less than two hundred dollars, although the costs added thereto may increase it beyond that sum. *Dumphy v. Guindon*, 13 *Cal.* 30; overruling *Gordon v. Ross*, 2 *Id.* 157; see *Zabriskie v. Torrey*, 20 *Id.* 174; and *Meeker v. Harris*, 23 *Id.* 286; *Stoddard v. Treadwell*, 29 *Id.* 281.

109. On Appeal.—The judgment of the Supreme Court on appeal, and costs consequent thereon, is final, and the District Court has no authority to prevent immediate execution of the judgment of this Court so remitted. (*City of Marysville v. Buchanan*, 3 *Cal.* 212.) The Clerk of the Supreme Court, in entering up the judgment, adds the words "with costs," and annexes to the *remittitur* a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue an execution. (*Id.*) The costs on appeal, or properly the costs in this Court, and the cost of making up the appeal in the court below, including the costs of making out the transcript and the costs of the former trial, abide the event of the suit. (*Gray v. Gray and Eaton v. Palmer*, 11 *Cal.* 341; *Ex parte Burrill*, 24 *Cal.* 350.) Case where each party was made to pay his own costs on

appeal. (*Bradbury v. Barnes*, 19 *Cal.* 120.) Case where costs of motion in Supreme Court were not allowed. (*Swain v. Naglee*, 19 *Cal.* 127.) Case where appellant paid costs in Supreme Court. *Jungerman v. Bovee*, 19 *Cal.* 354.

110. On Judgment Affirmed in Part and Reversed in Part.—Where a judgment was affirmed in part and reversed in part, the respondent was allowed his costs in the court below, but was required to pay the costs of the appeal. (*Cole v. Swanston*, 1 *Cal.* 51.) Judgment may be affirmed as to a *mandamus*, but reversed as to costs. *McDougall v. Roman*, 2 *Cal.* 80.

111. On Judgment Modified.—Where a judgment of the Court was incorrect in part, the appellate court ordered the court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal. *Welch v. Sullivan*, 8 *Cal.* 512.

112. On New Trial Awarded.—When a judgment for plaintiff is refused by the appellate court, and a new trial is awarded, if plaintiff recovers judgment on the second trial, he is entitled to his costs in the court below incurred on the first trial. *Stoddard v. Treadwell*, 29 *Cal.* 281.

113. On Judgment Reversed.—Where a judgment is reversed by the Supreme Court, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the Supreme Court. The costs of the former trial abide the event of the suit. (*Ex parte Burrill*, 24 *Cal.* 350.) Where the judgment below is reversed on appeal, and a new trial had, the costs of the first trial are part of the final bill of costs. (*Vischer v. Webster*, 13 *Cal.* 58.) Appellant made to pay costs, although the judgment is reversed. (*Reniff v. Cynthia*, 18 *Cal.* 669.) If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at appellant's cost. (*Tryon v. Sutton*, 13 *Cal.* 491.) If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing. (*Gray v. Gray*, 11 *Cal.* 341.) Defendants below and appellants here, on the main question, to wit: the injunction, required to pay costs in this Court on both appeals. *Jungerman v. Bovee*, 19 *Cal.* 355.

114. On Remittitur.—The party responsible for erroneous proceedings after the *remittitur* has been sent down from the Supreme Court, must pay the costs of those proceedings, and the costs consequent on a second appeal caused by them. (*Argenti v. City of San Francisco*, 30 *Cal.* 458.) When a judgment is reversed by the Supreme Court, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the Supreme Court; the costs of the former trial abide the event of the suit. (*Ex parte Burrill*, 24 *Id.* 350.) If the printed transcript in the Supreme Court is unnecessarily long, the party responsible for this will be adjudged to pay the costs of printing thus unnecessarily incurred. (*People v. Holden*, 28 *Id.* 129.) The clerk of the court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum and the costs of the Clerk of the Supreme Court, as certified by him or the *remittitur*. *Ex parte Burrill*, 24 *Id.* 350.

115. Right of Use of Water.—In an action to try the right of the use of water, and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs. *Marius v. Bicknell*, 10 *Cal.* 217; *Vautan v. Reese*, 20 *Id.* 90.

PART TENTH.

NEW TRIAL.

CHAPTER I.

NEW TRIAL IN GENERAL.

1. A new trial is a re-examination of an issue of fact in the same Court, after a trial and decision by a jury, court, or referee. (*Cal. Pr. Act*, § 192; *Laws of Nevada*, § 192; *Oregon*, § 231; *Idaho*, § 195; *Arizona*, § 194; *Wash. Ter.* § 242.) At common law, new trial is defined to be "a re-examination of an issue of fact before a court and jury, which had been tried at least once before the same court and jury." (*Hilliard on New Trials*, 1.) It is said "the origin of the practice of granting new trials is concealed in the night of time." In modern practice, as well as in former times, new trials are granted for the purpose of more fully securing to the parties litigant complete justice.

2. New trials are granted on the theory: *First*, That at the former trial there was some error of law committed by the Court; or, *Second*, That at the former trial some evidence material to the issue was not presented, the existence of which testimony being then unknown to the party making the application

for a new trial, or at the time beyond his control, and which testimony is not cumulative in its character; or, *Third*, Surprise whereby the rights of the parties were materially affected at the former trial. In other words, new trials are granted for errors of the Judge in matters of *law*, and errors of the jury in matters of *fact*. (Bachill *v.* Phillips, 1 *Hempst.* 23.) And in any event, a new trial must be granted for some matter outside of the record. 19 *Geo.* 1; Warren *v.* Litchfield, 7 *Greenlf.* 69.

3. The law presumes the verdict to be correct, and hence the party excepting must show clearly that the former decision was wrong. Error must distinctly appear, and not be left shadowed in doubt. When, for instance, there are more issues than one submitted, one good, and the rest bad, and a general finding, the presumption is that the jury disregarded the immaterial issue. *Hilliard on New Trials*, 17.

4. When a party desires to show that a judge ruled erroneously, it must be made to appear: *First*, What rulings were made. *Second*, That they were excepted to. *Third*, Wherein they were erroneous. *Fourth*, The materiality of the ruling; for unless the error had some influence in determining the verdict, no wrong is done, and a new trial should not be granted. (*Hilliard on New Trials*, 18.) *Fifth*, An exception against the weight of evidence is not good unless it clearly appear that all the evidence is in the record. (*Id.* 21.) All these are general propositions which are in this State authoritatively settled by our Statute, and the decisions of our courts. When a judgment and verdict are in accordance with the evidence, and there is no substan-

tial conflict in it upon any material issue, and no error has intervened, the Court has no right to grant a new trial, and if it do so its order will be set aside as unauthorized. *Lawrence v. Burnham*, 4 *Nev.* 361.

5. When a suit has been regularly prosecuted to judgment, and substantial justice has been done, the parties are not entitled to invoke the interposition of the Court for the purpose of having the cause re-tried and again determined, at the expense of the public, and to the delay of other suitors, although both of the litigants join in the application. (*Nichols v. Sixth Avenue R.R. Co.*, 10 *Bosw.* 260.) It is useless to put parties to the additional trouble and expense of a new trial, when it is clearly seen that after a protracted litigation the result must be the same. *Tohler v. Folsom*, 1 *Cal.* 213; *Smith v. Compton*, 6 *Id.* 26; *Suñol v. Hepburn*, 1 *Id.* 285.

6. A new trial cannot be granted until there has been a determination of the issues. (*Putnam v. Crombie*, 34 *Barb.* 232.) Where a new trial is ordered, and the order is based upon a decision determining the principles of law which govern the action, the new trial must be conducted in accordance with the principles thus determined. (*Hubbard v. Sullivan*, 18 *Cal.* 508; *Leese v. Clark*, 20 *Cal.* 387; *Saule v. Ritter*, 20 *Cal.* 522; *Table Mt. Tunn. Co. v. Stranahan*, 21 *Cal.* 548; *Heirs of Nieto v. Carpenter*, 21 *Cal.* 455; *Mitchell v. Davis*, 23 *Cal.* 381; *Moore v. Murdock*, 26 *Cal.* 524; *Lucas v. San Francisco*, 28 *Cal.* 591; *Estate of Pacheco*, 29 *Cal.* 224; *Mulford v. Estudillo*, 32 *Cal.* 131; *Kiles v. Tubbs*, 32 *Cal.* 332; *Argenti v. Sawyer*, 31 *Cal.* 414.) A new trial cannot be prosecuted pending an appeal from an

order granting the same. (Ford *v.* Thompson, 19 Cal. 118.) Where judgment of the appellate court directs the court below what judgment to render, a new trial is not authorized. Argenti *v.* City of San Francisco, 30 Cal. 458.

POWER OF COURT TO GRANT.

7. The courts of the United States are empowered to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law; and to establish all necessary rules for the orderly conducting business in the said courts, not repugnant to the laws of the United States. (*Act of Cong.*, Sept. 24, 1789, § 17; 1 *Stat. at L.* 83; 1 *Bright.* 792.) So, in actions for the recovery of a penalty, although the verdict was in favor of the defendant.

8. On a reversal of a judgment, in an action brought by a writ of error from a district court, the circuit court of another State may, if justice require it, award a *venire facias de novo* triable at the bar of such circuit court, according to the provisions of Section 24 of the Act of Sept. 24, 1789, above mentioned. (*Dougl.* 722; *Cowp.* 87; 3 *Johns.* 443; 5 *Mass.* 391; *Id.* 407; 5 *Cranch*, 281; 6 *Id.* 268; *Id.* 274; *Id.* 285; and disapproving 2 *Strange*, 1,055; see *United States v. Sawyer*, 1 *Gall.* 86; *United States v. Wonson*, *Id.* 5; *United States v. Harding*, 1 *Wall. jr. C. Ct.* 127; S.C., 6 *Pa. Law J.* 14; *United States v. Macomb*, 5 *McLean*, 286; and see *United States v. Taylor*, 4 *Cranch C. Ct.* 238.) If the judge of a district or circuit court die, his successor has power to grant a new trial. *Life and Fire Ins. Co. of N.Y. v. Wilson*, 8 *Pet.* 291.

9. The power of a court of common law to grant new trials, and the grounds upon which it may be granted, explained. (*United States v. Thirteen hundred and sixty-three bags of merchandize*, 2 *Sprague U.S.* 85; S.C., 15 *Law Rep. (N.S.)* 600.) The Legislature has no power to grant a new trial or re-open a judgment in an action litigated between individuals. *People v. Frisbie*, 26 *Cal.* 135.

10. The Court has power to set aside report of referee, and grant a new trial, on the ground that evidence before referee did not justify his decision. (*Cappe v. Brizziolara*, 19 *Cal.* 607.) Or for any reason that would be sufficient to set aside the award of an arbitrator. (*Headley v. Reed*, 2 *Cal.* 322.) Or the verdict of a jury. (*McHenry v. Moore*, 5 *Cal.* 90.) But not unless exceptions are embodied in the report of the referee. *Tyson v. Wells*, 2 *Cal.* 122; *Grayson v. Guild*, 4 *Id.* 122; *Branger v. Chevalier*, 9 *Cal.* 353; *Butte v. Morgan*, 19 *Id.* 609.

11. The County Court has power to grant a new trial. (*Dickenson v. Van Horn*, 9 *Cal.* 207.) The appellate power of the Supreme Court over the County Court could not be properly or efficiently exercised unless the power to grant a new trial existed in the County Court. (See *Dorsey v. Barry*, 24 *Cal.* 455.) But the County Court has no power to grant a new trial, in a special case, to contest an election under the Statute. (*Cosgrave v. Howland*, 24 *Cal.* 457.) That such proceedings are special cases, (*Keller v. Chapman*, 34 *Cal.* 640.) A *mandamus* will not lie to compel a county judge to try a cause, on the ground that he

has improperly dismissed the appeal taken from a justice's court. *People v. Weston*, 28 *Cal.* 639.

12. A new trial may be granted by a justice of the peace, on motion, within two days after entry of judgment. (*Cal. Pr. Act*, § 622.) Causes for application and proceedings thereon, see (*Id.* § 622, *et seq.*) On appeal from the Justice's Court to the County Court on questions of law alone, if a new trial be ordered, it should take place in the County Court. *People v. Frelon*, 8 *Cal.* 517.

IN EQUITY CASES.

13. The Practice Act applies as well to legal as to equitable actions, and a court may, of its own motion, set aside the verdict of a jury, when clearly and palpably against the evidence. (*Duff v. Fisher*, 15 *Cal.* 375.) The practice is the same in all cases. (*Green v. Butler*, 26 *Cal.* 599.) As there is no substantial difference between a re-hearing in an equity case and a new trial in a law case. (*Riddle v. Baker*, 13 *Cal.* 295.) And, where equity seems to demand it, the case will be remanded for a new trial. (*Lanfear v. Harper*, 16 *La. An.* 382.) But they will interfere with great caution. *Meredith v. Johns*, 1 *Hem. & M.* 585.

14. It is a well established rule that equity never will grant a new trial of a matter which has been determined in a court of law; it being a matter over which the court of law has full jurisdiction. (*Green v. Robinson*, 5 *How. Miss.* 80.) But where injustice is done by a final judgment, without default of defendant therein in pleadings, or producing evidence, equity will inter-

fere. Or the chancellor may direct a new trial at law, on sufficient reason being shown, and for failure to apply to the common law judge. (*Hunt v. Boyier*, 1 *J. J. Marsh.* 484.) So, a new trial at law was decreed where the officer's return had been altered. *Chambers v. Handley*, 4 *Barb.* 284.

15. Chancery will not order a new trial at law in favor of a party who has neglected to apply at law, except under very special circumstances. (*Faltz v. Paurie*, 2 *Desau. U.S.* 40; *Hill v. McNeill*, 8 *Porter U.S.* 432; *Gales v. Shipp*, 2 *Bibb. U.S.* 241; *Patterson v. Matthews*, 3 *Bibb. U.S.* 80.) A party cannot maintain an action in a court of equity, to obtain a new trial in a court of law, without showing that he had no opportunity to move for a new trial in the law court, by reason of mistake, accident or surprise, unaccompanied by any fault or negligence on his part. (*Mastich v. Thorp*, 29 *Cal.* 444; *Faulkner v. Harwood*, 6 *Rand. U.S.* 125; *Cummins v. Kennedy*, 4 *J. J. Marsh.* 642; *Harrison v. Harrison*, 1 *Litt.* 137.) Or where no circumstances of fraud are shown. (*Boland v. Thornton*, 12 *Cal.* 441; *Mastich v. Thorp*, 29 *Cal.* 444; *Boston v. Haynes*, 33 *Cal.* 31; *Land v. Elliott*, 1 *S. & M.* 608; *Herring v. Winans*, 1 *S. & M. Ch.* 466.) Or unless the judgment was obtained through fraud, accident, or mistake, unconnected with negligence or inattention on the part of the judgment-debtor. *Day v. Welles*, 31 *Conn.* 344.

16. A purchaser of land during pendency of suit against grantor for its recovery, with notice of suit pending, who neglects to defend it till judgment is rendered, and then neglects to move for a new trial, can-

not obtain a new trial in a court of equity. (*Mastick v. Thorp*, 29 *Cal.* 444.) An application made in a court of equity for a new trial, on the ground that the defendant was defaulted, and thereby prevented from maintaining a claim in set-off, will be referred, if it does not appear that he is in danger of losing his claim. *Clute v. Ewing*, 21 *Texas*, 679.

17. A court of equity should not grant a new trial at law upon the ground that a party was deprived, without fault on his part, of his remedy, by writ of error to correct erroneous rulings on the first trial, when no error in the judgment at law appears on the record. (*Parker v. Horne*, 38 *Miss.* 215.) So, error in that prejudice is not a ground of complaint. (*McKay v. Leonard*, 17 *Iowa*, 569.) Where a party moves for a new trial and fails, he cannot, on the same facts, go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 *Cal.* 223; *Bolan v. Thornton*, 12 *Id.* 441; *Mastick v. Thorp*, 29 *Cal.* 444.

GRANTING MOTION DISCRETIONARY.

18. Motions for new trial are addressed to the sound discretion of the Court, and are granted or denied, not as matter of strict right, but as the substantial justice of the case may appear to require. (*N.Y. Code*, § 264, Subd. 4; 18 *Wend.* 79; 20 *Id.* 658; 2 *N.Y.* 563; 3 *Barb. Ch.* 371; 2 *Daniels Ch.* 1,307; *Drake v. Palmer*, 2 *Cal.* 177; aff'd in *Hastings v. Steamer "Uncle Sam,"* 10 *Cal.* 341; *Cooke v. Stewart*, *Id.* 353; *Speck v. Hoyt*, 3 *Cal.* 413; *Watson v. McClay*, 4 *Id.* 288; *Duel v. Bear River and Auburn Mining Co.*, 5 *Id.* 84; *Hanson v. Barnhisel*, 11 *Id.* 340; *Peters v. Foss*, 16 *Id.*

357; *Smith v. Richmond*, 15 *Cal.* 501; *Nooney v. Mahoney*, 30 *Cal.* 226; *O'Brien v. Brady*, 23 *Cal.* 243; *Burnett v. Whitesides*, 15 *Id.* 36; *Quinn v. Kenyon*, 22 *Id.* 82; *Weddle v. Stark*, 10 *Cal.* 301; *Lestrade v. Barth*, 17 *Cal.* 285; *Hall v. Bark "Emily Banning,"* 33 *Cal.* 525; *McKnight v. Wells*, 1 *Mo.* 13; *Singleton v. Mann*, 3 *Mo.* 464; *Rennick v. Walon*, 7 *Mo.* 292; *Clayton v. Yarrington*, 33 *Barb.* 145; *State v. Anderson*, 19 *Mo.* 241; *Platt v. Munroe*, 34 *Barb.* 291; *Housee v. Hammond*, 39 *Barb.* 96; *Gore v. Moses*, 1 *Wash. T.* 13; compare *Davis v. Glasgow*, *Burn. (Wis.)* 8; *Newby v. Terr. of Oregon*, 1; *Or. T.* 163; *Matter of Marsh*, 6 *Law Rep.* 67; *Roots v. Brown*, 1 *Bibb. U.S.* 354; *McLanahan v. Universal Ins. Co.*, 1 *Pet. U.S.* 170; *Calbreath v. Gracy*, 1 *Wash C. Ct.* 198; *Denniston v. McKeen*, 2 *McLean*, 253; *United States v. Martin*, *Id.* 256; *Benedict v. Davis*, *Id.* 347; *Cherry v. Sweeney*, 1 *Cranch C. Ct.* 530; *Lloyd v. Scott*, 4 *Id.* 205; *People v. Duchess C. P.*, 20, *Wend.* 658; *Shepherd v. Brenton*, 15 *Iowa*, 84; *Whitney v. Blunt*, *Id.* 283; *McNair v. McComber*, *Id.* 368; *McKay v. Thornton*, *Id.* 25; *Head v. Langworthy*, *Id.* 235; *House v. Wright*, 22 *Ind.* 383; *Heimlin v. Fish*, 8 *Minn.* 70; *Maroney v. State*, *Id.* 218.) Except when made solely on exceptions; (*Farmers' and Mechanics' Bank v. Whinfried*, 24 *Wend.* 419;) or on the ground of irregularity; and even in such cases, in actions of an equitable nature, see (*Clayton v. Yarrington*, 33 *Barb.* 145; *Forrest v. Forrest*, 25 *N.Y.* 501.) A court is not bound to grant a new trial, although both parties desire it. *Phelan v. Rinz*, 15 *Cal.* 90; *Aiken v. Braen*, 21 *Ind.* 137; *Nichols v. Sixth Av. R.R. Co.*, 10 *Bosw.* 260.

19. A new trial should not be granted unless the

evidence strongly preponderates against the verdict. (*Oldham v. Henderson*, 4 *Mo.* 295; *Milliken v. Greer*, 5 *Mo.* 489; *Shobe v. Marris*, 6 *Id.* 489; *Dooly v. Jennings*, 6 *Id.* 61; *Campbell v. Hood*, *Id.* 211; *Lackey v. Lane*, 7 *Id.* 220; *Henry v. Forbes*, 7 *Id.* 455; *Tiffin v. Forrester*, 8 *Id.* 642; *Williams v. State*, 9 *Id.* 268; *Robbins v. Alton Ins. Co.*, 12 *Id.* 380; *Williams v. Baker*, 49 *Maine*, 427.) Or where the question of law was adverse to the verdict. (*Speck v. Hoyt*, 3 *Cal.* 413.) Or where errors intervened in the trial of a cause. (*Hastings v. Steamer "Uncle Sam,"* 10 *Cal.* 341.) Or where the judgment is erroneous, by reason of a wrong construction given to the description of land in a deed in evidence. (*Hicks v. Coleman*, 25 *Cal.* 145; *Piercy v. Crandall*, 34 *Cal.* 334.) So, where on the trial it was not fully disclosed by the evidence where the initial point was located in the boundary of land, a new trial was ordered for a more full disclosure. (*Piercy v. Crandall*, 34 *Cal.* 334.) Or, where the jury, without particular instructions, returned a verdict payable in gold coin, though there was no evidence that the defendant promised in writing to pay in gold coin, a new trial was granted. *Howard v. Roeben*, 33 *Cal.* 399.

20. In Indiana, it appears that in a civil case, only two new trials can be granted to the same party in the cause, upon any grounds whatever. (*Roberts v. Robeson*, 22 *Ind.* 456.) The Court will not entertain a second application for a new trial by the same party in the same suit, unless it appears or is shown that the party did not know or could not have known the grounds upon which the second application rests at the time the former application was submitted. (*Hays v. Kenyon*, 7 *Rhode Island*.) In New York, in actions to re-

cover possession of lands, the grant of a third trial is in the discretion of the Court. *Wright v. Milbank*, 9 *Bosw.* 672.

COURT MAY IMPOSE TERMS.

21. If the findings are not sustained by the evidence, in a question of damages, the Court may require the plaintiff to remit the damages or submit to a new trial. (*Carpentier v. Gardner*, 29 *Cal.* 160; see *Benedict v. Cozzens*, 4 *Id.* 382.) After the Court grants a new trial *on terms*, as a rule, the Court above will not interfere in these matters. (*Hilliard on New Trial*, 53.) The terms upon granting new trials are peculiarly within the discretion of the Court, with the exercise of which the appellate court will not interfere, except on a clear showing of abuse or grossly unreasonable terms. (*Rice v. Gashirie*, 13 *Cal.* 54; *Battelle v. Connor*, 6 *Id.* 140.) Reduction of verdict. (*Harrison v. Peabody*, 34 *Cal.* 179; *Chapin v. Bourne*, 8 *Id.* 296; *Rice v. Gashirie*, 13 *Id.* 53; *Benedict v. Cozzens*, 4 *Id.* 381.) Remission of damages. (*Patterson v. Ely*, 19 *Id.* 28; *Carpentier v. Gardener*, 29 *Id.* 160.) On payment of costs. (*Tyson v. Wells*, 1 *Id.* 378; *Overing v. Russell*, 28 *How. Pr.* 151; see, also, *East Riv. Bk. v. Hoyt*, 22 *Id.* 478; *North v. Sergeant*, 33 *Barb.* 350; *Kelly v. Upton*, 12 *How. Pr.* 140; *Zimmerman v. Marchland*, 23 *Ind.* 474.) It seems to be the rule in England, if a *new trial* is allowed on a *question of merits*, costs will be allowed, but otherwise if allowed for irregularity. (*Hilliard on New Trial*, 53.) So, if payment of costs be made a condition precedent, and it is not done in the time prescribed, the judgment remains in force. (*Id.* 53; 15 *Ill.* 380; 6 *Texas*, 199.) Where a party complies with the terms

imposed, and avails himself of the order, he cannot afterwards question its correctness. *Battelle v. Connor*, 6 *Cal.* 140.

22. In New York, where a new trial is granted to plaintiff, he must proceed to trial without notice from the defendant, or he may be nonsuited. (*Jackson v. Johnson*, 7 *Cow.* 419; distinguishing 9 *Johns.* 265; *Mottran v. Mills*, 1 *Sandf.* 671.) Or the defendant may enter the rule granted to plaintiff, if plaintiff delays. (*Gale v. Hoysradt*, 3 *How. Pr.* 47.) But if defendant obtains an order for a new trial, he must serve copy of rule upon plaintiff. *Jackson v. Wilson*, 9 *Johns.* 265.

CHAPTER II.

PROCEEDINGS ON MOTION FOR NEW TRIAL

1. There are three distinct steps recognized by the California Practice Act (§ 195) in a proceeding to obtain a new trial, for the taking of which, except the last a particular period of time is allowed: *First*, A notice of intention to move for a new trial; *Second*, Filing and serving statement or affidavits; and, *Third*, The motion for a new trial. (*Jenkins v. Frink*, 27 *Cal.* 337.) An order extending the time for taking either of these steps should express with precision the object to be attained. *Jenkins v. Frink*, 27 *Id.* 337.

*No. 1034.**Notice of Intention to Move for New Trial.*

[TITLE.]

To, attorney for plaintiff:

Take notice, that defendant C. D., on the day of, 18.., at the court room of said Court, in the City Hall of the County of and State of, and at the hour of o'clock A.M. on that day, or as soon thereafter as counsel can be heard, will move this Court for a new trial in said cause. Said motion will be made and based upon the following grounds and assignment of errors, to wit:

I. Irregularity in the proceedings of the Court [jury, or adverse party, or any order of the Court, or abuse of discretion], by which the defendant was prevented from having a fair trial [*specify the irregularity*].

II. Misconduct of the jury [*or a resort by the jury to the determination of chance on the questions submitted to them*].

III. Accident or surprise, which ordinary prudence could not have guarded against.

IV. Newly discovered evidence material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

V. Excessive damages appearing to have been given under the influence of passion or prejudice, to wit: the evidence does not show that plaintiff was damaged in an amount exceeding dollars.

VI. Insufficiency of the evidence to justify the ver-

dict [*or other decision; or that the verdict is against law*].

VII. Errors in law occurring at the trial, and excepted to by the defendant, to wit:

1. The Court erred in striking out part of defendant's answer.

2. The Court erred in allowing the cause to go to trial until all the defendants known to the plaintiff were served or otherwise appeared.

3. The Court erred in admitting plaintiff to prove that [*state what*].

4. The Court erred in refusing to allow defendant to prove that [*state what*].

5. The Court erred in refusing defendant's motion for nonsuit on the ground [*state grounds of nonsuit*].

6. The Court erred in refusing the instruction to the jury asked for by the defendant [*or in giving the instruction to the jury asked for by the plaintiff: [state what instructions]*].

NOTE.—The second of the above causes would not generally be error.

2. Decision, when Rendered.—Judgment is rendered when it is announced and entered in the minutes. (*Casement v. Ringgold*, 28 Cal. 337; *Gray v. Palmer*, *Id.* 416; *Carpentier v. Thurston*, 30 *Id.* 123; *Peck v. Courtis*, 31 *Id.* 207; *Genella v. Relyea*, 32 *Id.* 159.) If, on trial by the Court, the decision be orally announced and entered by the Clerk, and the Judge, several days after, in vacation, signed his formal written findings and draft of judgment, the decision cannot be said to have been rendered till it was filed by the Clerk and became a part of the record. (*Carpentier v. Thurston*, 30 Cal. 123.) If the findings are filed, and the case is then sent to a referee to take and state an account, the time does not begin to run till after the final report of the referee is filed. *Crowther v. Rowlandson*, 27 Cal. 376.

3. Extension of Time.—A notice of intention to move for a new trial may be extended thirty days. *Harper v. Minor*, 27 *Cal.* 113.

4. Filing Notice.—Notice of intention, filed within the statutory time, gives the Court jurisdiction so far as to be able to dispose properly of the motion for new trial, even if the term is adjourned; but if no notice is filed, then the Court loses jurisdiction of the case. (*Killip v. Empire Mill Co.*, 2 *Nev.* 34.) The Court cannot order notice filed *nunc pro tunc*; (*Killip v. Empire Mill Co.*, 2 *Nev.* 34;) when tried by a commissioner or referee, or by the Court, within ten days after receiving written notice of the filing of the findings of such commissioner, referee, or court. (*Cal. Pr. Act*, § 195; *Carpentier v. Thurston*, 30 *Cal.* 123.) The ten days do not begin to run till written notice of the rendering of the decision has been served. (*Roussin v. Stewart*, 33 *Cal.* 208; *Carpentier v. Thurston*, 30 *Cal.* 123.) A party cannot abandon his first notice and file a second. (*Le Roy v. Rassette*, 32 *Cal.* 171.) Failure to file and serve notice of intention on the opposite party within the time prescribed is a waiver of right to move for a new trial. *Bear River and Auburn Wat. and Min. Co. v. Boles*, 24 *Cal.* 354; *Caney v. Silverthorne*, 9 *Cal.* 67; *Ellsasser v. Hunter*, 26 *Cal.* 279.

5. Must be in Writing.—Notice of intention should be in writing. *Borland v. Thurston*, 12 *Cal.* 448; *Bear River and Auburn Wat. and Min. Co. v. Boles* (No. 1), 24 *Cal.* 354; *Killip v. Empire Mill Co.*, 2 *Nev.* 34.

6. Notice as a Stay of Proceedings.—A notice filed in time stays the operation of the judgment. (*Lurvey v. Wells*, 4 *Cal.* 106.) But it will not suspend an injunction. (*Ortman v. Dixon*, 9 *Cal.* 23.) If the plaintiff is entitled to an injunction, and obtain one before the trial, he is entitled to retain it upon the cause being remanded for a new trial. (*Hess v. Winder*, 34 *Cal.* 270.) Nor, after Court has filed its findings and sent the case to a referee, will it stay the proceedings pending before said referee. *Crowther v. Rowlandson*, 27 *Cal.* 376.

7. Notice must be Given or Waived.—Notice must be either given or waived to give jurisdiction. (*Bear River and Auburn Water and Mining Co. v. Boles*, 24 *Cal.* 354.) If no notice is given of an intention to move for a new trial, a statement made and filed and agreed to by the parties, or settled by the Judge, cannot be made the

foundation of a motion, nor annexed to the record of the judgment or order from which the party may appeal. (*Fleteau v. Lubeck*, 24 *Cal.* 364.) A notice may be presumed to have been given though none appears on the record. *Godchaux v. Mulford*, 29 *Cal.* 316.

8. Service of Notice.—Notice of intention to move for a new trial must be served on the opposite party within five days after rendition of the verdict, general or special, in a case tried by a jury. (*Garwood v. Simpson*, 8 *Cal.* 108; *Duff v. Fisher*, 15 *Id.* 380; *Ellsasser v. Hunter*, 26 *Cal.* 279; *Allen v. Hill*, 16 *Id.* 113.) Nor will the acknowledgement of service of notice on a particular day be a waiver of the objection that service on that day came too late. *Towdy v. Ellis*, 22 *Cal.* 650.

9. Service, Waiver of.—If the record does not show that the party resisting application for a new trial proposed amendments to the statement, or participated in its settlement, waiver of service will not be presumed. *Calderwood v. Brooks*, 28 *Cal.* 151.

10. Waiver of Notice.—The filing of a counter statement is a waiver of objection to a want of notice of intention. *Williams v. Gregory*, 9 *Cal.* 76.

11. What Notice Must Contain.—The notice shall designate generally the grounds upon which the motion will be made. *Cal. Pr. Act*, § 195.

12. When to be Given.—The notice of motion for a new trial must be given: *First*, Within five days, if the action was tried by a jury. *Second*, Within ten days, if the action was tried by a commissioner, referee, or by the Court, the time to run from the date of the findings of such commissioner, referee, or court; or if the decision was made in open court, then within ten days after written notice of the filing thereof. (*Cal. Pr. Act*, § 195.) In Nevada and Arizona, Idaho and Washington Territory, notice of motion must be filed within two days after the trial, and the affidavits or statement must be filed within five days after notice. (*Laws of Nev.* § 195; *Arizona*, § 197; *Wash. Terr.* § 245; *Idaho*, § 198.) Notice given one day before judgment rendered, and six days after filing report, is ineffectual. (*Mahon v. Caperton*, 15 *Cal.* 313.) Where the trial was before the Court, and it does not appear that notice was given, the statement cannot be objected to on the

ground, that it was not filed within the time prescribed by the Practice Act. *Burnett v. Stearns*, 33 *Cal.* 468.

STATEMENT AND AFFIDAVITS.

13. A new trial will not be granted except on a statement or affidavits. (*Jenkins v. Frink*, 30 *Cal.* 586; *Moore v. Wood*, 19 *How. Pr.* 409; *Allgro v. Duncan*, 24 *How. Pr.* 210.) An application for a new trial must be accompanied by a statement of facts or a bill of exceptions. (*Arnold v. Williams*, 21 *Tex.* 413; *Angell v. Street*, *Id.* 485; *Cox v. Hutchings*, 21 *Ind.* 219.) When an application for a new trial is made for a cause mentioned in the first, second, third and fourth subdivisions of Section 193 of the Practice Act, it shall be made on affidavits; but for any other cause, upon a statement. (*Cal. Pr. Act*, 194, *Oregon*, § 235; *Nevada*, 194; *Idaho*, 197; *Arizona*, § 195; *Wash. Ter.* § 244.) And the adverse party may use counter affidavits on the hearing. See the following section.

14. A party, in an application for a new trial, should not rely upon his own single unsupported statement, but should, if possible, procure affidavits of persons whose testimony he deems material. (*Rogers v. Huie*, 1 *Cai.* 429; *Jenny Lind Co. v. Bower*, 11 *Cal.* 195; *People v. Jocelyn*, 29 *Cal.* 562; *Boggs v. Lynch*, 22 *Mo.* 563.) The Court will not set aside a regular verdict on a mere affidavit of merits. (*Gilliland v. Morrell*, 1 *Cai.* 154.) Affidavits in support of the motion for a new trial will not be considered by the Supreme Court, unless incorporated in the statement or bill of exceptions. *People v. Honshell*, 10 *Cal.* 83.

13. They must be made part of the record, either by certificate of judge, or by statement, or by bill of exceptions, or they will not be considered. (*Gordon v. Clark*, 22 *Cal.* 533; in criminal cases, *People v Price*, 17 *Cal.* 310.) Affidavits may be identified by the indorsement of the Judge or Clerk, at the time, as having been read or referred to in the hearing. (*Cal. Pr. Act*, § 195.) So with deeds, documents and depositions. (*Loucks v. Edmondson*, 18 *Cal.* 203; *Hess v. Winder*, 30 *Cal.* 349.) And where they are not set forth in the record, the party is deprived of all ground of error based upon them, but not the errors apparent on the face of the record. *Branger v. Chevalier*, 9 *Cal.* 353.

STATEMENT OF ERRORS.

14. There may be some cases of equitable relief where the general ground of appeal will be sufficient; still, in the majority of cases, a particular specification is required. (*Barrett v. Tewksbury*, 15 *Cal.* 358.) As that the evidence does not establish a contract. (*Barrett v. Tewksbury*, 15 *Cal.* 358.) That the suit is barred by a former adjudication, between the same parties, upon the same subject matter. That the cause of action is barred by the Statute of limitations. That the property in question was the separate property of the wife. So, an erroneous instruction may be assigned as error, if there be any evidence rendering it pertinent to the issue. (*Barrett v. Tewksbury*, 15 *Cal.* 359.) And may be stated thus, that the respondents are not parties in interest and entitled to bring the suit, having previously divested themselves of their right of property in question. (*Barrett v. Tewksbury*, 15 *Cal.* 359.) So, as to other errors of law. (*Algro v. Duncan*, 24 *How. Pr.*

210.) And to rulings of law. *Wolf v. Chalker*, 31 *Conn.* 121.

15. The office of a statement on motion for new trial is to bring into the record those matters only which arise in the progress of the trial, and constitute the basis of the motion under the fifth, sixth, and seventh subdivisions of Section one hundred and ninety-three of the Practice Act, and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial. (*Harper v. Minor*, 27 *Cal.* 109.) Matters which do not seem to illustrate the point, such as verifications, acknowledgment of deeds and titles of courts, should be omitted; (*Estate of Boyd*, 25 *Cal.* 513;) substituting the words, "duly verified," "duly acknowledged," "title of cause," etc. (*Id.*) (*Mariner v. Smith*, 27 *Cal.* 654; *Provost v. Piper*, 9 *Cal.* 552.) But a skeleton statement containing the words "[here insert deed, etc.]" describing it, without consent of parties, will be stricken from the transcript. *Kimball v. Semple*, 31 *Cal.* 657.

16. It is seldom necessary to insert an entire deed; it is sufficient to say that a deed was introduced from A. to B., showing that A.'s title has vested in B. (*Kimball v. Semple*, 31 *Cal.* 657; *Burnett v. Tolles*, *Cal. Sup. Ct., Oct. T.*, 1869.) They may be inserted in the transcript, if they are mentioned in the statement as having been an evidence, with a certificate of the Judge that it was before him on motion for a new trial. (*Hess v. Winder*, 30 *Cal.* 349.) So, affidavits in a foreign language may be excluded. (*Spencer v. Doane*, 23 *Cal.* 419.) Transcripts of records and deeds, where no point is made on the construction of the language,

may be referred to by a brief statement. (*Knowles v. Inches*, 12 *Cal.* 212; *Hess v. Winder*, 30 *Cal.* 349.) Where documentary evidence is referred to, the appellant cannot insert copies of the same in the transcript, without the assent of the other party, unless the statement has been engrossed and settled, and afterwards authenticated, or unless the originals are on file and form part of the records. *Kimball v. Semple*, 31 *Cal.* 657.

PREPARING STATEMENT.

17. The statement shall be prepared within five days after giving notice of intention, or within such further time, not exceeding twenty days, as the Court, or Judge thereof, or court commissioner may grant. *Cal. Pr. Act*, § 195; *Partridge v. San Francisco*, 27 *Cal.* 416.) The Practice in New York is substantially the same. (*N.Y. Supreme Ct., Rule 33 of 1847*; 34 of 1858.) For San Francisco County, see (*Dist. Court Rules Nos. xxviii., xxix.*) The practice which prevails in some of the lower courts of submitting a motion for a new trial, and not preparing the statement until after the motion has been denied, is irregular and not to be tolerated. (*Waggenheim v. Hook*, 35 *Cal.* 216.) A statement on motion for a new trial cannot be waived. Even when attorneys of both parties appear in open court, and by consent argue a motion for a new trial, it is not a waiver of the statement in some proper form of the grounds of the motion. (*Walls v. Preston*, 25 *Cal.* 59.) Nor can it be stricken out. (*Quivey v. Gambert*, 32 *Cal.* 304.) But if no notice of intention is given within the statutory time, and no waiver of the failure is shown, the Supreme

Court will strike the statement from the transcript. (*De Castro v. Richardson*, 25 *Cal.* 49.) Or it may be corrected in the Supreme Court. *Wormouth v. Gardner*, 35 *Cal.* 227.

18. The statute prescribing the practice in motions for new trials is as follows: The moving party prepares his statement, and submits it to the opposite party. If satisfactory to him, they add a certificate, which they sign. If not, he proposes amendments, and submits them to the moving party, and if they are accepted by him, the statement is then engrossed accordingly, and to the engrossed copy a certificate is added and signed by them, to the effect that the statement is correct and agreed to by them. If they cannot agree, the statement and proposed amendments are submitted to the Judge, who allows or denies, according to circumstances. After the Judge has thus determined what shall constitute the statement, it is engrossed accordingly, and a certificate added to the effect that it is correct, and if not signed by counsel must be signed by the Judge. Nothing can be regarded by the Supreme Court as a statement which is not authenticated in one of these modes. *Cosgrove v. Johnson*, 30 *Cal.* 511.

AMENDMENTS BEFORE SETTLEMENT OF STATEMENT.

19. Amendments may be filed, without prejudice to the right to object, at the hearing to the notice or statement, that it was not filed or served in time. (*Quivey v. Gambert*, 32 *Cal.* 304.) Time within which amendments may be made is left for the regulation of the Court. (*Vilhac v. Biven*, 28 *Cal.* 409.) Five days is reasonable time. (*Warden v. Mendocino Co.*, 32 *Cal.*

655.) Every amendment must be on the case made, or refer to the line and page in which it is proposed to be inserted. (*Milward v. Hallett*, 1 *Cai.* 344.) The right to amend does not authorize preparing and proposing a new case by way of substitute for the one served. (*Id.*; *Eagle v. Abner*, 1 *Johns. Cas.* 332; see *Grah. Pr.* (2 *Ed.*) 332.) A refusal to allow an amendment is presumed to be right, unless the character of proposed amendment be shown in the records. *Jessup v. King*, 4 *Cal.* 331.

20. The Statute makes no provision for the service of amendments to a statement or a copy thereof upon the adverse party. (*Vilhac v. Biven*, 28 *Cal.* 409.) Otherwise by *Dist. Court Rule xxviii. of City and County of San Francisco.*) Where amendments to defendant's case were sent by plaintiff's attorney to counsel in season, but by accident did not reach in time for settlement, a motion to amend was entertained. (*Hun v. Bowne*, 1 *Cai.* 23.) Where there are amendments to a proposed statement, the draft proposed and the amendments allowed should be incorporated into one document. (*People v. Edwards*, 9 *Cal.* 286; *Skillman v. Riley*, 10 *Id.* 300.) And a fair copy should be made. (*Marlow v. Marsh*, 9 *Cal.* 259.) When agreed to by the parties, it shall be accompanied by the certificate of the parties, or their attorneys, that the same has been agreed upon and is correct. (*Cal Pr. Act*, § 195.) When time has been granted to prepare statement for new trial, the Court has no power after adjournment to amend the order, so as to make it include a notice of intention. *De Castro v. Richardson*, 25 *Cal.* 49.

WHAT STATEMENT MUST CONTAIN.

21. The former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of the party: *First*, Irregularity in the proceedings; *Second*, Misconduct of the jury; *Third*, Accident or surprise; *Fourth*, Newly discovered evidence; *Fifth*, Excessive damages; *Sixth*, Insufficiency of evidence; *Seventh*, Error in law. *Cal. Pr. Act*, § 193; *N.Y. Code*, § 264; *Law of Nevada*, § 193; *Oregon*, § 232; *Idaho*, § 196; *Wash. Terr.* § 243; *Arizona*, § 195.

22. When the notice designates that the application is made upon the insufficiency of the evidence to justify the verdict which was rendered, the statement shall specify the particulars in which the evidence was insufficient; and, *Second*, When the motion is made on the ground of errors of law occurring at the trial and excepted to by the moving party, the statement shall specify the *particular errors* upon which the party will rely. If it fails to do this, the motion will be disregarded. *Cal. Pr. Act*, § 195; *Love v. Sierra Nev. Lake Wat. and Min. Co.*, 32 *Cal.* 639; *Hutton v. Reed*, 25 *Cal.* 478; *Walls v. Preston*, 25 *Cal.* 59.

23. A specification of the particular grounds of error is the essential element of a statement. (*Cal. Pr. Act*, § 195; *Hutton v. Reed*, 25 *Cal.* 483; *Partridge v. San Francisco*, 27 *Id.* 415; *Fitch v. Bunch*, 30 *Cal.* 208.) And all errors to which objection is made on motion for a new trial should be specified in the statement of facts. (*Crowther v. Rowlandson*, 27 *Cal.* 376; *Burnett v.*

Pacheco, *Id.* 408; Partridge *v.* San Francisco, *Id.* 415.) The Statute on this point is merely directory. (Hoopes *v.* Meyer, 1 *Nev.* 433.) The error must be specified, if there is but one question of error that could be raised. (Zenith Gold and S. Min. Co. *v.* Irvine, 32 *Cal.* 302; Moore *v.* Murdock, 26 *Cal.* 524; Crowther *v.* Rowlandson, 27 *Id.* 385; Burnett *v.* Pacheco, *Id.* 408.) A statement not strictly in compliance with the law will still entitle the moving party to a hearing. Hoopes *v.* Meyer, 1 *Nev.* 433.

24. If, at the close of a statement on motion for new trial, the moving party says that he "will rely, on the argument of the motion for new trial in this cause, upon the following grounds," and then enumerates his grounds, he will be considered as abandoning all the grounds not enumerated. (Beans *v.* Emanuelli, 36 *Cal.* 117.) It is not enough that in the history of a case exceptions appear scattered here and there through a statement made on motion for new trial, but it is necessary in the statement to specify the particular errors upon which the party will rely. Beans *v.* Emanuelli, 36 *Cal.* 117.

25. The statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points specified. (*Cal. Pr. Act*, § 195; Hutton *v.* Reed, 25 *Cal.* 483; McMinn *v.* Whelan, 27 *Cal.* 319.) But evidence not bearing on those points should be excluded. (Provost *v.* Piper, 9 *Cal.* 552; Harper *v.* Minor, 27 *Cal.* 107; Estate of Boyd, 25 *Cal.* 513.) The courts should look at the substance of the contents of the statement, and disregard its imperfections in form. (Ringgold *v.* Haven, 1 *Cal.* 113.)

It is presumed that the statement on motion for a new trial contains all the evidence pertinent to the motion. *Clark v. Gridley*, 35 *Id.* 398; *Smith v. Athearn*, 34 *Id.* 506; *Owen v. Morton*, 24 *Id.* 375; but see *Hidden v. Jordan*, 28 *Id.* 301; *Moore v. Tice*, 22 *Id.* 513.

26. Application on the ground of error in instructions must point out with reasonable certainty and particularity the error complained of. (*Estep v. Larsh*, 21 *Ind.* 183; *Peck v. Hensley*, 21 *Ind.* 344.) Error in disregarding the evidence offered by defendant to show the title to the lands in dispute to be in him, and in sustaining either or any of the objections made by the plaintiff to the admissibility of said evidence, or any part thereof, is a defective specification, and the form disapproved, but the point was considered under the peculiar circumstances of the case. (*Sharp v. Lumley*, 34 *Cal.* 611.) The findings of the Court need not be embodied in the statement or bill of exceptions. (*Reynolds v. Harris*, 8 *Id.* 618.) But if new trial is applied for on the ground that the findings are against the evidence, a specification of each particular finding which is deemed against the evidence is necessary. *Fitch v. Bunch*, 3 *Id.* 208; *Leroy v. Rogers*, 30 *Id.* 229.

FILING STATEMENT.

27. As before stated, the statement or affidavit shall be filed with the Clerk within five days after giving notice of intention to move for new trial. (*Cal. Pr. Act*, § 195; *Laws of Nev.* § 195; *Arizona*, § 197; *Idaho*, § 198; *Harper v. Minor*, 27 *Cal.* 107.) In Oregon and Washington Territories the practice is somewhat different. In

case of an extension of the time to file notice of intention, five days from the filing of such notice, and the Court has power to extend the time twenty days. (*Cal. Pr. Act*, § 195; *Harper v. Minor*, 27 *Cal.* 107.) If no affidavit or statement be filed within five days after the notice, or within such further time as the parties may agree upon or the Court may order, the right to move for a new trial shall be deemed waived. (*Cal. Pr. Act*, § 195; *Wing v. Owen*, 9 *Cal.* 247; *Easterby v. Larco*, 24 *Id.* 179; *Jenkins v. Frink*, 27 *Id.* 337; *Le Roy v. Rasette*, 32 *Id.* 171; *Hegeler v. Henckell*, 27 *Id.* 491.) Unless the objection be waived by the opposite party. (*Munch v. Williamson*, 24 *Id.* 167.) But the party who claims such waiver of failure to file statement must prove it beyond doubt. (*Munch v. Williamson*, 24 *Id.* 167.) If not filed within the time prescribed, the Court will only look to the judgment roll. *Lafferty v. Brownlee*, 11 *Id.* 132; *Kavanagh v. Maus*, 28 *Id.* 261.

28. Where the trial was before the Court, and it does not appear that the notice of filing the findings required by Statute was given, the statement cannot be objected to on the ground that such notice was not filed within the time prescribed by the Practice Act. (*Burnett v. Stearns*, 33 *Cal.* 468.) The Court has no power to extend the time more than twenty days beyond the expiration of the five days' notice. (*Harper v. Minor*, 27 *Cal.* 114.) Such an order is void. (*Bear River and Auburn Wat. and Min. Co. v. Boles* (No. 1.), 24 *Id.* 354.) An order extending time must be construed as giving twenty days from the date of the order, not from the time of giving notice. (*Jenkins v. Frink*, 27 *Id.* 337; *Easterby v. Larco*, 24 *Id.* 179.)

And filing it on the twenty-first day after the order is too late. *Jenkins v. Frink*, 27 *Id.* 337.

No. 1035.

Notice of Settlement of Statement.

[TITLE.]

A. B., Esq., attorney for plaintiff, John Doe:

Please take notice that the defendant's statement, to be used on his motion for a new trial herein, will be settled by the Judge of this Court on the day of, 18.., at o'clock, at his chambers, in the City Hall of the City of, in the County of

29. Amendments after Settlement.—An amendment after settlement, adding no facts or exceptions, and not affecting the merits, and in furtherance of justice, is in the discretion of the Court, and may be allowed. (*Valentine v. Stewart*, 15 *Cal.* 387; affirmed in *Loucks v. Edmondson*, 18 *Id.* 203, in case of a clerical error; *Wendt v. Ross*, 33 *Cal.* 650.) But otherwise a court should not entertain motion to amend after it has been filed and served on the opposite party. (*Levy v. Getleson*, 27 *Cal.* 685.) Nor, unless good reason be shown, receive an affidavit made after time has elapsed. (*Howe v. Briggs*, 17 *Cal.* 385.) A statement agreed to should not be amended, unless under a very clear showing of mistake or fraud. (*Hutchinson v. Bours*, 13 *Cal.* 52.)

30. By Stipulation.—Settlement of statement by stipulation of attorneys of parties constitutes a true and correct statement, without further certificate or identification, and a waiver of all technical objections to the transcript. (*Godchaux v. Mulford*, 26 *Cal.* 316; *Millard v. Hathaway*, 27 *Cal.* 119.) And becomes a part of the judgment roll. (*Burnett v. Pacheco*, 27 *Cal.* 409; *Heslep v. San Francisco*, 4 *Cal.* 2.)

31. By the Court.—Statement on motion for new trial shall be

settled by the judge or referee before whom the cause was respectively tried. (*Rule xxii. Dist. Court of San Francisco.*) A statement, when not agreed to by the adverse party, shall be settled by the Judge, upon notice. (*Cal. Pr. Act, § 195; Nevada, § 195; Arizona, § 197; Idaho, § 198; Rule No. xxii. of the Cal. Dist. Courts.*) The Judge has a right to see that the charge is correctly inserted; (*Root v. King, 6 Cow. 569;*) and he may insert such facts as he conceives necessary to make his charge intelligible, or opinions expressed in the hearing of the jury. *Walsworth v. Wood, 7 Wend. 483.*

32. Effect of Notice.—If the notice of the time and place of the settlement of a statement is given to appellant, and he does not attend, he cannot afterwards complain of the statement as settled. *Dist. Court, Rule xxviii. for San Francisco County; Vilhac v. Biven, 28 Cal. 409.*

33. Engrossment of Statement.—The proper practice is to engross the statement as settled, and so much of the deeds and other documentary evidence as is directed to be inserted, with the authentication of the Judge or attorneys indorsed on the engrossed statement. *Dist. Court, Rule xxviii., San Francisco County; Kimball v. Sample, 31 Cal. 657; Marlow v. Marsh, 9 Cal. 259.*

34. How Authenticated.—When settled by the Judge, the same shall be accompanied with his certificate that the same has been allowed by him and is correct. (*Cal. Pr. Act, § 195; Redman v. Gulnac, 5 Cal. 148.*) A statement not authenticated by certificate of the parties or the Judge will not be regarded. (*Vilhac v. Biven, 28 Cal. 409; Cosgrove v. Johnson, 30 Id. 509.*) A statement signed by the Judge, and appearing from the minutes of the Court to have been used on the hearing of the motion, is sufficiently authenticated. (*Kidd v. Laird, 15 Cal. 161.*) Agreeing to submit a motion, without the statement having been settled or authenticated, does not waive objection to want of authentication. (*Cosgrove v. Johnson, 30 Cal. 509.*) A refusal to strike out a proposed amendment is not an authentication and settlement of a statement. (*Cosgrove v. Johnson, 30 Cal. 509; Harley v. Young, 4 Cal. 284.*) Nor is an indorsement by the Judge at the bottom of the settlement that the amendments were allowed. (*Baldwin v. Ferre, 23 Cal. 461.*) Where the record shows simply a statement signed by the Judge, without any certificate preceding as to the correctness of the statement, it is insufficient. (*McCartney v. Fitz Henry, 16 Cal. 184.*) Unless a state-

ment be agreed to by counsel or settled by the Judge, it has not sufficient authentication to constitute any portion of the record. *Doyle v. Seawall*, 12 *Cal.* 425; *Paige v. O'Neill*, *Id.* 492.

35. Settlement, when Made.—Such statement should be settled by the Judge and certified by him before the motion is decided. (*Waggenheim v. Hook*, 35 *Cal.* 216.) It must be shown affirmatively that statement was agreed to or was settled by the Judge, or it will be rejected. (*Linn v. Twist*, 3 *Cal.* 89; *Cosgrove v. Johnson*, 30 *Cal.* 509; *Vilhac v. Biven*, 28 *Cal.* 409.) But it need not be shown affirmatively that the settlement was upon proper notice, or in presence of both parties. (*Battersby v. Abbott*, 9 *Cal.* 565.) The method of making and settling statements commented on, *Levey v. Fargo*, 1 *Nev.* 416.

No. 1036.

Affidavit on Ground of Irregularity.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above entitled action.

II. The jury was irregularly impaneled in the said cause, having been selected by the Sheriff from the bystanders and not from the body of the County; that no venire was issued in said cause, nor return thereon made by the Sheriff of said County.

[*Or*, II. That the jury, after having retired, were permitted to come into Court and receive instructions during the absence of the defendant herein, and of his counsel.]

[SIGNATURE.]

[*Jurat.*]

36. Affidavit Essential.—Application for new trial, on the ground of misconduct of the jury, must be sustained by an affidavit

showing its truth. (*Urban v. Craigg*, 21 *Ind.* 174.) A motion for a new trial for misconduct of opposite party must be accompanied by an affidavit of the facts relied upon. *Paquetel v. Gauche*, 17 *La. An.* 63.

37. Exceptions must be Taken.—A new trial will not be granted if objection be not made till after verdict, because jurors had not been drawn according to law. (*Amherst v. Hadley*, 1 *Pick.* 38.) Or were not sworn. (*Hardenburgh v. Crary*, 15 *How. Pr.* 307.) Nor that some of the jurors were irregularly selected. (*Page v. Danvers*, 7 *Met.* 326.) Nor that a talesman sat on a trial, for which he was not returned. (*Howland v. Gifford*, 1 *Pick.* 43.) Nor, in a capital case, because a juror belonged to another county. (*Amherst v. Hadley*, 1 *Pick.* 42.) Nor because foreman happened to serve as foreman in the case, no foreman having been regularly appointed for that purpose. (*Amherst v. Hadley*, 1 *Pick.* 42.) Nor because one of the jurors was over sixty-five years old. (*Munroe v. Brigham*, 19 *Pick.* 368.) Nor for partiality of a juror, where the principal questions in the trial were mere questions of law. (*Borden v. Borden*, 5 *Mass.* 67.) But otherwise, if on his *voire dire* he failed to discover the fact, and it was afterwards discovered that he did not stand indifferent in the cause. (*Jeffries v. Randall*, 14 *Mass.* 205.) These exceptions arise under the peculiar statutes of the States where the decisions were made.

38. Exceptions must be Taken.—A new trial will not be granted where one of the jurors was a stockholder in the company. (*Orrok v. Commonwealth Ins. Co.*, 21 *Pick.* 456.) Nor where the jury was summoned by the constable instead of the sheriff. (*Commonwealth v. Norfolk*, 5 *Mass.* 435; see 2 *Allen*, 556.) Nor for interest of a juror, if known to counsel before the trial. (*Kent v. Charlestown*, 2 *Gray*, 281.) Nor that judge is not impartial, if then known to counsel. (*Crosby v. Blanchard*, 7 *Allen (Mass.)* 385.) The absence of a juror, and suspension of examination thereby, without objection: *Held*, no objection to the verdict. (*Eastman v. Tuttle*, 1 *Conn.* 248; *Exp. Hill*, 3 *Id.* 355.) See statutes of the States where these decisions were made.

39. Grounds of Motion.—A new trial will be ordered when there is such irregularity in the proceedings that the ends of justice will be better subserved. (*Sannickson v. Brown*, 5 *Cal.* 58.) A verdict can be set aside only for some irregularity in obtaining it. (*Goodall v. Batchelder*, 17 *N.H.* 386.) It is within the discretion of

the Court to set aside a verdict in consequence of irregularity in the conduct of the jury. (*United States v. Gillies*, *Pet. C. Ct.* 159; *Knight v. Freeport*, 13 *Mass.* 218; *McIlvaine v. Wilkins*, 12 *N.H.* 474, 476; *People v. Douglass*, 4 *Cowen*, 26; 1 *Mass.* 530; 14 *Id.* 205; 1 *Pick.* 38; 3 *Ohio*, 53; 3 *Bibb.* 446; 8 *Pick.* 170; *Reynolds v. The Champ. Trans. Co.*, 9 *Pr. Rep.* 7; *Taylor v. Giger*, *Hardin's Rep.* 586; *Steele v. Logan*, 3 *A.K. Marsh.* 394; 19 *Pick.* 311; 1 *B. Munroe*, 213; 13 *Conn. Rep.* 346; *Hawks v. State*, 21 *Tex.* 526; *Drummond v. Leslie*, 5 *Blackf. Rep.* 453; *Busick v. The State*, 19 *Ohio Rep.* 198.) The misconduct must be shown, and it must be shown to have resulted to the injury of the party against whom verdict was rendered. (*Smith v. Thompson*, 1 *Cow.* 221; *Horton v. Horton*, 2 *Id.* 589; *Oliver v. First Presb. Church*, 5 *Id.* 283; *Wilson v. Abrahams*, 1 *Hill*, 207; *Harrison v. Price*, 22 *Ind.* 165.) So in a criminal case. (*Whelchell v. State*, 23 *Ind.* 89.) If the misconduct or irregularity is satisfactorily proved, positive injury need not be shown. *Johnson v. Root*, 2 *Fish*, 291; compare *Henry v. Ricketts*, 1 *Cranch C. Ct.* 545; *Madden v. State* 1 *Kansas*, 340.

40. Grounds of Motion.—Where the judgment was rendered at 9 A.M. upon a summons citing defendant to appear at 10 A.M., a new trial will be ordered. (*Parker v. Shephard*, 1 *Cal.* 132.) An irregularity in the formation of a jury which goes to the merits of the trial, or leads to the inference of improper influence upon their conduct. (*Thrall v. Smiley*, 9 *Cal.* 529.) After jury has once retired, to allow them to come into court and receive instructions in the absence of the parties or their counsel. (*Redman v. Gulnac*, 5 *Cal.* 148.) If the Court, after the case is submitted, examines books of account as evidence, which have not been given in evidence during the trial, it must be stated in the records to be one of the grounds on which motion will be made for a new trial. (*Wilcoxon v. Burton*, 27 *Cal.* 237.) Where it is evident the jury acted under a mistaken impression as to the legal effect of the evidence, or in total disregard of it, a new trial will be granted. (*Minturn v. Burr*, 20 *Cal.* 48.) Or where it is manifest from the testimony that the verdict of the jury must have been given under a state of great excitement. (*People v. Acosta*, 10 *Cal.* 195.) But that one of the jurors "knew and was aware of the circumstances connected with the affair," if no objection to him was made until after verdict rendered, is not sufficient ground. *Lawrence v. Colliers*, 1 *Cal.* 37,

41. Grounds of Motion.—Improper conduct on the part

of the prevailing party towards a witness, as by threats, persuasions, etc., is a ground for new trial. (7 *Mod.* 156; 1 *Pick.* 38, 42; 13 *Mass.* 218.) Or the production of an interested witness, known to be such, without disclosing the circumstance. (15 *Mass.* 378.) If defendant, without objection, permits plaintiff's counsel to draw inferences which he deems unfair and unjust, or to indulge in argument calculated to improperly influence, prejudice, or mislead the jury, it is too late after verdict to rely upon it as grounds for a new trial. (*Ames v. Potter*, 7 *Rhode Island*, 265.) Also held, where plaintiff had erred in practice, through erroneous advice of counsel, a new trial will be ordered. (*Rogers v. Niagara Ins. Co.*, 2 *Hall*, 559.) But this does not seem to be a good reason for a new trial. Disorderly conduct on part of spectators, calculated to influence the jury, as being a manifestation of popular feeling, or which prevents the jury from hearing the charge. (*Conrad v. Williams*, 6 *Hill*, 444.) A new trial awarded in a peculiar case on the ground that the case had not been fully considered in certain important aspects. *Mills v. Van Voorhies*, 20 *N.Y.* 412; 10 *Abb. Pr.* 152.

42. Insufficient Grounds.—It is no ground for setting aside a verdict that there were good grounds of challenge to a juror. (*Thompson v. Paige*, 16 *Cal.* 77; *Hollingsworth v. Duane*, *Wall. C. Ct.* 147.) Nor that the Court rejected a competent juror. (*West v. Forrest*, 22 *Mo.* 344.) Nor the withdrawal of a juror, and the continuance of a case thereby. (*Benedict v. Cozzens*, 4 *Cal.* 382.) Or, where the officer in charge permits a juror to go into his own house to change his linen, if in sight of the officer. (*State v. O'Brien*, 7 *Rhode Island*, 336.) The bare fact that evidence is brought to the notice of the jury out of its regular order. (*Rice v. Cunningham*, 29 *Cal.* 492.) Or that a deposition was sent to the jury with instructions as to its admissibility. (*Foster v. McO'Brien*, 18 *Mo.* 88.) Are insufficient as grounds.

43. Insufficient Grounds.—The fact that instructions given by the Court are lost or mislaid is no ground for a motion for new trial. (*Visher v. Webster*, 13 *Cal.* 58.) Nor that a deposition alleged to contain material matter was lost. (*Chapman v. Chapman*, 4 *Call.* 430.) If a juror, before retiring, asks the Clerk as to a fact appearing from the records, and no objection is made, a new trial should not be granted. (*Allen v. Blunt*, 2 *Woodb. & M.* 121, 147.) Calling in the Clerk to inquire if they were correctly informed how to make the computation, no injury resulting (*Dennison v. Powers*, 35 *Vt.* 39), is not sufficient grounds.

44. Insufficient Grounds.—Where a slip of newspaper was handed by the deputy sheriff to the jury during the trial, containing matters relating to the trial, and the Court subsequently instructed the jury that the slip was not in evidence, and should be wholly disregarded, and it appeared that the perusal could not have prejudiced the losing party: *Held*, not ground for new trial. (*Thrall v. Smiley*, 9 *Cal.* 529; see, also, to the same effect, *United States v. Gibert*, 2 *Sumn. U.S.* 19.) *Held*, in Illinois, that where the Sheriff communicates with the jury by remarks he may be fined. (*Reins v. People*, 30 *Ill.* 256.) Or where juror read report of the cause in a newspaper to which he was a regular subscriber, it is not sufficient grounds. (*United States v. Reid*, 12 *How. U.S.* 361.) Or had heard the case discussed, if the objection be not raised at the proper time. *State v. Daniels*, 44 *N.H.* 383.

45. Insufficient Grounds.—Where the interference of strangers with the jury is unattended with corruption in the latter, and has not been prompted by a party, and it does not appear that any injustice has thereby been done, it is not sufficient. (*People v. Boggs*, 20 *Cal.* 432; affirmed in *People v. Symonds*, 22 *Cal.* 353; *Nesmith v. Clinton Fire Ins. Co.*, 8 *Abb. Pr.* 141.) Where a sealed verdict was given to the officer in charge of the jury—the Clerk being absent—which was given to the Clerk next morning, and the next morning the verdict is opened in presence of the jury and read by the Clerk, without exception, it is not sufficient ground for a new trial. (*Paige v. O'Neal*, 12 *Cal.* 483.) A new trial will not be granted in a criminal case because a sheriff takes charge of the jury where a deputy sheriff was sworn, nor because the Judge informs the jury, through the Sheriff, that if they do not agree in five minutes they must remain in the jury room over night. *People v. Hughes*, 29 *Cal.* 257.

*No. 1037.**Affidavit on Ground of the Misconduct of the Jury.*

[TITLE.]

[VENUE.]

L. M., being duly sworn, deposes and says as follows:

The jury impaneled in the above entitled cause, in finding their verdict in the same, resorted to the determination of chance, to wit: [each juror threw dice, upon an agreement that the one who threw the highest number should name the verdict, whereupon Q. R. threw the highest number and fixed the verdict.]

[*Jurat.*]

[SIGNATURE.]

46. Chance Verdict.—The verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside. (*Cal. Pr. Act*, § 192; *Downer v. Palmer*, 23 *Cal.* 40.) That where the jury entered into an agreement that each should mark down upon a separate piece of paper the amount which he thought the plaintiff was justly entitled to recover, which amounts after being added together, should be divided by twelve, and that the quotient should be their verdict, is a chance verdict, if they agree to be bound by the result, (*Turner v. Tuol. Co. Water Co.*, 25 *Cal.* 400; *Wilson v. Berryman*, 5 *Cal.* 44; *People v. Barker*, 3 *Wheel. Cr.* 19; 5 *City H. Rec.* 85; *Denton v. Lewis*, 15 *Iowa*, 301.) That it is not a chance verdict, if they do not agree to be bound by the result, but reserve to themselves the right to dissent, *Wilson v. Berryman*, 5 *Cal.* 44; *Boyce v. California Stage Co.*, 25 *Cal.* 460; *People v. Hughes*, 29 *Id.* 257; *Turner v. Tuol. Co. Water Co.*, 25 *Id.* 400; *Conklin v. Hill*, 2 *How. Pr.* 6; *Fowler v. Colton*, *Burn.* (*Wis.*) 175; *Barton v. Holmes*, 16 *Iowa*, 252.

46. Declaration of Juror.—Where a juror had previously made declaration in relation to the prisoner personally, as well as to the general question of the insurrection, in a trial for treason, manifesting bias or predetermination, a new trial was granted. (*United States v. Fries*,

3 *Dall. U.S.* 515; see Northampton Insurgents' Case, *Whart. St. Tr.* 458, 598.) Separation of the jury is not, in the absence of any appearance of prejudice to the party complaining of it, ground for a new trial, or where there is no ground of suspicion that they have been tampered with. (3 *Cow.* 355; 4 *Id.* 26, 38; 5 *Id.* 283; 2 *Wend.* 52; 3 *Johns.* 252; 7 *Id.* 32; 4 *Barn. & A.* 430; *State v. Barton*, 19 *Mo.* 227; *State v. Harlon*, 21 *Id.* 446; *State v. Igo*, *Id.* 459; *Green v. Bliss*, 12 *How. Pr.* 428; *Oliver v. First Presb. Ch.*, 5 *Cow.* 283; *Smith v. Thompson*, 1 *Id.* 221; *Horton v. Horton*, 2 *Id.* 589; *Perkins v. Ermel*, 2 *Kans.* 325; *Anthony v. Smith*, 4 *Bosw.* 503; *Burrill v. Phillips*, 1 *Call.* 360.) Even if verdict be subsequently modified. (*Nims v. Bigelow*, 44 *N.H.* 376; *Noninger v. Knox*, 8 *Minn.* 140.) Where a juror drinks liquor, as a remedy for disease, after retiring in charge of the officer, a new trial will be granted. (*Brant v. Fowler*, 7 *Cow.* 562; doubted in *Wilson v. Abrahams*, 1 *Hill*, 208; *State v. Baldy*, 17 *Iowa*, 39; *State v. Bullard*, 16 *N.H.* 139; *Harrison v. Rowan*, 4 *Wash. C. Ct.* 32; *Madden v. State*, 1 *Kans.* 340.) But not when prisoner's counsel consented in open court to this indulgence, unless shown that the indulgence was grossly abused, and operated injuriously to the prisoners. (*United States v. Gibert*, 2 *Sumn. U.S.* 19.) Proof of declarations of juror made after verdict cannot be received for the purpose of impeaching it. (*Hollingsworth v. Duane*, *Wall. C. Ct.* 147; *Holmead v. Corcoran*, 5 *Cranch C. Ct.* 119.) The amendment of 1862 to Section 193 of the Practice Act, allowing the affidavits of the jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trials made after its passage, although the verdict and judgment sought to be set aside were rendered previously. *Donner v. Palmer*, 23 *Cal.* 40.

48. Impeaching Verdict.—The affidavits of jurors are not admissible to impeach their verdict, either for error or mistake in respect to their verdict, nor for irregularity or misconduct of themselves or their fellows; (1 *T.R.* 11; 2 *Id.* 281; 4 *Bos. & P.* 226;) or to show that they intended something different; (2 *Tidd.* 817; 5 *Cow.* 121; 5 *Burr.* 2,667; *Turner v. Tuol. Water Co.*, 25 *Cal.* 400; *People v. Hughes*, 29 *Id.* 257; *Boyce v. Cal. Stage Co.*, 25 *Id.* 473; *Clum v. Smith*, 5 *Hill*, 560; *Ladd v. Wilson*, 1 *Cranch C. Ct.* 305; *Green v. Bliss*, 12 *How. Pr.* 428; *Cline v. Broy*, 1 *Or.* 90; *Dana v. Tucker*, 4 *Johns.* 487; *Reins v. People*, 30 *Ill.* 256; *Brownell v. McEwen*, 5 *Den.* 367; *Cline v. Broy* 1 *Or.* 89; *People v. Columbia*, *Com. Pleas*, 1 *Wend.* 297; *Howard v. Cobb*, 3 *Day.* 309; *Jackson v. Dickenson*, 15

Johns. 309; *Hughes v. Lister*, 23 *Ind.* 396; *Edmiston v. Garrison*, 18 *Wis.* 594; *Taylor v. Everett*, 2 *How. Pr.* 23;) except under special circumstances; (*Cal. Pr. Act*, § 193; *Little v. Birdwell*, 21 *Texas*, 597; see *Perkins v. Ermel*, 2 *Kans.* 325;) as where mistake arises from misdirection of the judge. (*Exp. Caykendoll*, 6 *Cow.* 53; *Alston v. Jones*, 17 *Barb.* 276; *Storey v. Brennan*, 15 *N.Y.* 524; *Gardner v. Clark*, 17 *Barb.* 538; see, further, "*Verdict*," *Ante*, p. 470.) But such affidavits may be received to show improper conduct of successful party in approaching them on the subject. (*Reynolds v. Champlain Trans. Co.*, 9 *How. Pr.* 7.) Or they may be introduced to sustain the verdict. *Dana v. Tucker*, 4 *Johns.* 487; *Nesmith v. Clinton Fire Ins. Co.*, 8 *Abb. Pr.* 141.

49. Taking out Papers.—If the jury take out plaintiff's account without the consent of the defendant, the Court will grant a new trial. (*Hutchinson v. Decatur*, 3 *Cranch C. Ct.* 291; *Simms v. Templeman*, 5 *Id.* 163; compare *United States v. Clark*, 2 *Id.* 152.) But if papers taken out without consent are not read by the jury, *held*, no ground for setting aside the verdict. (*Hackley v. Hastie*, 3 *Johns.* 252; compare *Mitchell's Case*, 1 *City Hall Rec.* 147.) Or, that they took out through mistake a deposition which was irrelevant and immaterial to the issue. *Aliter*, if it was delivered to the jury by the counsel of the party in whose favor verdict was rendered. (*Lonsdale v. Brown*, 4 *Wash. C. Ct.* 148.) The jury having found a sealed verdict, but upon being polled one of them dissented; on being sent out for further deliberation they returned all concurring in the same verdict. *Held*, no irregularity. (*Bunn v. Hoyt*, 3 *Johns.* 255; *Douglass v. Tousey*, 2 *Wend.* 352.) The mere fact that a juror attempts to communicate the verdict to a party in whose favor it is rendered, before its announcement, is not sufficient ground for setting verdict aside. *Fash v. Byrnes*, 14 *Abb. Pr.* 12; distinguishing 1 *Tyler*, 250.

*No. 1038.**Affidavit on Motion—Ground of Surprise.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above entitled cause.

II. Previous to the trial of said cause, to wit, on the day of, 18 . . ., at, one M. N. informed me that he knew and would testify to [*state a material point in defense*], and relying on said assurance I took no steps to procure the testimony to said fact, and summoned the said M. N. to testify to the same, but the said M. N. when called to the stand at the trial of said cause, by collusion with the plaintiff therein [*or state any fact or occurrence for which defendant is not responsible*], testified contrary to what he had previously stated he should do, and the verdict, which was against the defendant, was mainly attributable to said testimony, and on a new trial [*state material point*] will be established by evidence, and a different verdict will result.

III. I am able to prove the same fact by O. P., who resides at, and whose testimony I can procure at the new trial of this cause.

[SIGNATURE.]

[*Jurat.*]

50. Affidavit.—The affidavit on a motion for new trial, on the ground of surprise, should set forth particularly and distinctly the facts which the party expects to be able to prove by his witnesses. (Rogers

v. Hine, 1 *Cal.* 429; *Warren v. Ritter*, 11 *Mo.* 354; *State v. McLaughlin*, 27 *Mo.* 111.) It must set forth due diligence; (*Smith v. Mathews*, 6 *Mo.* 600;) and the facts constituting legal surprise should be shown by the affidavits of the attorney, and not by the client; (*Shellhouse v. Ball*, 29 *Cal.* 605;) and by the affidavits of the witnesses. (*People v. Jocelyn*, 29 *Cal.* 562; *Phenix v. Baldwin*, 14 *Wend.* 62.) A new trial will not be granted on affidavit by a witness of mistake in his testimony on the trial, unless there be a clear showing of mistake, and that it was injurious to the party, and that he had no means, or had used due diligence to correct it. *Howe v. Briggs*, 17 *Cal.* 385.

51. Grounds of Motion.—Accident or surprise, such as ordinary prudence could not have guarded against, is a good ground for a motion for a new trial. (*Patterson v. Ely*, 19 *Cal.* 28; *Guy v. Hanly*, 21 *Id.* 937; *Cook v. De la Guerra*, 24 *Id.* 237; *Casement v. Ringgold*, 28 *Id.* 335; *Crooks v. Lyon*, 3 *Id.* 113; *Beech v. Tooker*, 10 *How. Pr.* 297; 1 *Abb. Pr.* 297; *People v. Marks*, 10 *How. Pr.* 261; *Taylor v. Harlow*, 11 *Id.* 285; *De Leyer v. Michaels*, 5 *Abb. Pr.* 203; *Meakin v. Anderson*, 11 *Barb.* 216; *Mersereau v. Pearsall*, 6 *How. Pr.* 293; *Fellows v. Emperor*, 13 *Barb.* 92; *Peck v. Hiler*, 30 *Barb.* 655.) And an order for new trial on this ground will not be reversed unless there has been an abuse of discretion. (*Mooney v. Mahoney*, 30 *Cal.* 226.) The surprise must be some matter of fact, not of law. *Craig v. Fanning*, 6 *How. Pr.* 336.

52. Grounds.—Where one party to an action is misled by the act of the other, justice demands that a new trial should be granted. (*Pinkham v. McFarland*, 5 *Cal.* 137; *Jackson v. Van Antwerp*, 8 *Cow.* 273; *Jackson v. Warford*, 7 *Wend.* 62; *Taylor v. Harlow*, 11 *How. Pr.* 285.) Where a defendant, whose property has been attached, files an evasive answer under oath, admitting the indebtedness sued on, and then, on a trial between an intervenor and the plaintiff, testifies that the debt was not due, it is sufficient cause for new trial on the ground of surprise. (*Coghill v. Marks*, 29 *Cal.* 673.) Where a party to an action, previous to the trial, is told by a witness that he will testify in a certain manner to a material fact, and, relying on his statement, neglects to procure other testimony, and when called to the stand, the witness, either by collusion, or by any occurrence for which the party calling the witness is not responsible, testifies contrary to what he had previously stated, it is surprise in the sense in which the word is used, provided the party shows that

he will be able on the new trial to supply the testimony required. *Rodriguez v. Comstock*, 24 *Id.* 85.

53. Grounds.—Where it clearly appears that a witness has made a mistake in his testimony upon a material point which was in its nature calculated to and probably did decide the verdict, a new trial will be granted. (*Guy v. Hanly*, 21 *Cal.* 397; *Coddington v. Hurst*, 6 *Hill*, 595; *Richardson v. Fisher*, 1 *Bing.* 145.) But not where the witness acknowledging the mistake is only one of several who testifies to the same point. (*Mersereau v. Pearsall*, 6 *How. Pr.* 293.) Where defendant testified to payment, and plaintiff after such testimony had no time to produce evidence, but afterwards found witnesses who, refreshing their memory from an examination of plaintiff's books, could testify as to what took place at the time and place of the alleged payments, in disapproval of defendant's testimony: *Held*, good ground for a new trial for surprise and newly discovered evidence. (*Parshall v. Klinck*, 43 *Barb.* 203; but see *Berry v. Metzler*, 7 *Cal.* 418,) where it is held to be only ground for a continuance. If a witness absent himself after he has appeared, so that he cannot be examined, it is a surprise, and is ground for a new trial. (25 *Wend.* 663; *Ruggles v. Hall*, 14 *Johns.* 112.) If documents were ruled out which had been read without objection on a former trial, it is a surprise, and good ground for a new trial. (9 *Dana Rep.* 26.) And where seduction was charged on a certain day, not mentioned in the complaint, and on which day the defendant was able to prove an *alibi*, by witnesses who were not present at the trial, a new trial was granted. *Sargent v. Dinnison*, 5 *Cow.* 106.

54. Grounds.—Where a court enters judgment for damages, *non obstante veredicto*, after plaintiff had gone into proof as to damages, and the jury had returned a verdict upon the facts, that going into proof, etc., might well have induced defendant not to move to amend his answer, which motion the Court would probably have granted, and hence defendant might have been taken by surprise. (*Reniff v. The "Cynthia,"* 18 *Cal.* 669.) Where plaintiffs were permitted to prove and recover on a title other than the one set up, it was error in the court below to refuse a new trial. (*Eagan v. Delaney*, 16 *Cal.* 85.) Where defendant had a good defense, but was prevented from making it by accident, and without fault on his part, a new trial will be awarded. (*Ford v. Ford*, *Walker U.S.* 505.) But where a party lost his opportunity of defense by his own negligence, a new trial will not be granted. (*Dodge v. Strong*, 2 *Johns. C. R.* 228; *Dorflinger v. Coil*, 2 *Ham.* 311; *Hoomes*

v. Kuhn, 4 *Call. U.S.* 274; *Lucas v. Bank of Darien*, 2 *Stewart*, 280; *Telton v. Hawkins*, 2 *J. J. Marsh.* 1; *Green v. Robinson*, 5 *How. Miss.* 80.) So, on a misdirection of the Court in a matter not material to the merits of the cause. *Mayor v. Lewis*, 2 *Geo. Decis.* 205.

55. Insufficient Grounds.—If the party alleging surprise “can relieve himself from embarrassment in any mode, either by nonsuit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief.” (*Shellhouse v. Ball*, 29 *Cal.* 608; cited in *Doyle v. Sturlia*, *Cal. Sup. Ct., Jul. T.*, 1869; *Ames v. Howard*, 1 *Sumn. U.S.* 482; *Carr v. Gale*, 1 *Curt. C. Ct.* 384.) But a party will not be refused a new trial because when taken by surprise at unexpected testimony he did not ask for a continuance, if he had no knowledge at the time of evidence to rebut such testimony. (*Alger v. Merritt*, 16 *Iowa*, 121.) Where the plaintiff fails to appear at the trial, he cannot move for a new trial on the ground of mistake, inadvertence, surprise, or excusable neglect, on a motion made after the adjournment of the term. (*Casement v. Ringgold*, 28 *Cal.* 335; to somewhat similar effect, *Davis v. Presler*, 5 *S. & M.* 459.)

56. Insufficient Grounds.—Want of preparation is a ground for continuance, but no ground for a new trial. (*Turner v. Morrison*, 11 *Cal.* 21; *Stout v. Calver*, 6 *Mo.* 254; *Jackson v. Roe*, 9 *Johns.* 77.) So, where a witness absents himself without leave, and no attachment is asked for, it is no ground for a new trial. (*Stewart v. Small*, 5 *Mo.* 525.) Mere surprise at the evidence given by the witnesses of the defendant is not sufficient ground for a new trial. (*Live Yankee Co. v. Oregon Co.*, 7 *Cal.* 40.) At the testimony of a witness called by the adverse party. (*Taylor v. California Stage Co.*, 6 *Cal.* 228; *Shepard v. Citizens' Ins. Co.*, 8 *Mo.* 272; *Beach v. Tooker*, 10 *How. Pr.* 297.) Or because witnesses did not state facts which the party expected they would state. (*Martin v. Clarke*, *Hempst.* 259.) Nor where the plaintiff, testifying in his own behalf, sustains the averment of his own complaint. (*Cox v. Hutchings*, 21 *Ind.* 219; *Peck v. Hensley*, *Id.* 344.) Surprise at the testimony of a witness in stating a certain conversation incorrectly is no ground for a new trial. *Klockenbaum v. Pierson*, 22 *Cal.* 160; *Martin v. Clark*, *Hempst. U.S.* 259.

57. Insufficient Grounds.—Errors in judgment of an engineer employed by the defendants do not afford ground for a new trial.

(*Palmer v. Fiske*, 2 *Curt. C. Ct.* 14.) Nor at the ruling of the Court on the admission of testimony. (*Fuller v. Hutchings*, 10 *Cal.* 523.) Nor that the attorney was mistaken as to the time of the meeting of the Court, and was therefore not present. (*Steigers v. Darby*, 8 *Mo.* 679.) Inadvertance or omission on the part of a party's counsel cannot be admitted as a ground for a new trial. (*Casement v. Ringgold*, 28 *Cal.* 335; *Meeker v. Wilson*, 1 *Gall.* 419; *Allen v. Blunt*, 2, *Woodb. & M.* 121.) Nor on the part of the defendant. (*Yater v. Mullen*, 23 *Ind.* 562.) The plaintiff cannot be heard to complain of surprise at the requirement of evidence on his part clearly called for by the issues; (*Jackson v. Roe*, 9 *Johns.* 77;) even though he was led by the defendant (without fraud) to suppose that the fact in issue would be admitted. *Taylor v. Harlow*, 11 *How. Pr.* 285.

58. Insufficient Grounds.—A party cannot have a new trial on this ground, to enable him to rebut testimony which he was aware before the former trial might be introduced. (*Meakin v. Anderson*, 11 *Barb.* 215.) Nor that the party was surprised in a matter of law. (*Hite v. Lenhart*, 7 *Mo.* 22.) Nor that the party had given the suit no further attention, having instructed his attorney to accept compromise. (*Patchin v. Wegman*, 19 *Mo.* 151.) Nor that the party was mistaken as to the nature of his case. (*Robbins v. Alton Ins. Co.*, 12 *Mo.* 380.) Nor the unexpected close of plaintiff's case. (*Wells v. Sanger*, 21 *Mo.* 354.) If a mistake of law can ever be made the means of obtaining a new trial on the ground of surprise, it certainly cannot when it is caused by the negligence of such party. *People v. O'Brien*, 4 *Park. Cr.* 203.

59. Insufficient Grounds.—A new trial will not be granted on the ground of surprise caused by the rejection of evidence, when such evidence would not, in the judgment of the Court, have varied the result. (*Foote v. Silsby*, 1 *Blatchf.* 445.) The introduction of false evidence relating solely to a point not necessarily involved in the decision of the action, is no ground for a new trial. (*Guy v. Hanly*, 21 *Cal.* 397.) Surprise at the admission of a witness, because his attorney had advised him that the witness was incompetent, is no ground for a new trial. (*Klockenbaum v. Pierson*, 22 *Cal.* 160.) The mistake of counsel as to competency of a witness is no ground for a new trial. (*Packer v. Heaton*, 9 *Cal.* 568.) Nor as to what witnesses would testify. (*Robbins v. Alton Ins. Co.*, 12 *Mo.* 380.) Nor for mistake of some of the jurors in rendering their verdict. (*Cochran v. Street*, *Wythe U.S.* 69;

Woods *v.* Macrae, *Id.* 78.) Mere surprise at the result of a trial is no ground for a new trial. Lane *v.* Brown, 22 *Ind.* 239.

60. What must be Shown.—The cases establish that the party must prove the surprise, how he was injured by it, and that no laches are justly attributed to him. (Brooks *v.* Douglas, 32 *Cal.* 208; Patterson *v.* Ely, 19 *Id.* 28; 1 *A. K. Marsh.* 334; 3 *McCord's Rep.* 258; 2 *Id.* 313; 3 *A. K. Marsh.* 81; 1 *Id.* 28; 4 *Bibb. Rep.* 70; 1 *J. J. Marsh.* 96; 1 *Little Rep.* 24; 9 *Dana Rep.* 134.) That the surprise has not resulted from the fault or negligence of the moving party. (Rogers *v.* Huie, 1 *Cal.* 429; Williams *v.* Price, 11 *Cal.* 213; Schellhouse *v.* Ball, 29 *Cal.* 605; Whetmore *v.* Murdock, 3 *Woodb. & M.* 380; Henckley *v.* Hendrickson, 5 *McLean*, 170; Snowhill *v.* Knapp, 7 *N.Y. Leg. Obs.* 15; Craig *v.* Fanning, 6 *How. Pr.* 336.) And that the verdict is mainly attributable to the facts out of which the surprise resulted. (Schellhouse *v.* Ball, 29 *Cal.* 605; People *v.* Mack, 2 *Park. Cr.* 673; De Leyer *v.* Michaels, 5 *Abb. Pr.* 203.) And it must be shown by the best evidence within his reach (Schellhouse *v.* Ball, 29 *Cal.* 605) that some act prejudicial to him had been done; (Craig *v.* Fanning, 6 *How. Pr.* 336;) and that the party moving has been injured, and that upon a rehearing he can make out his title, and what that title is; (Patterson *v.* Ely, 19 *Cal.* 28; Brooks *v.* Douglas, 32 *Id.* 208; Craig *v.* Fanning, 6 *How. Pr.* 336;) and that he has a valid defense, and that on new trial the result may be different. Cook *v.* De La Guerra, 24 *Cal.* 237; McClusky *v.* Gerhauser, 2 *Nev.* 47.

No. 1039.

Affidavit on Motion—Ground of Newly Discovered Evidence

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above entitled action.

II. Subsequent to the trial of said cause, to wit: on the day of, 18 . . ., I have discovered evidence which will establish the fact [*state a fact material*

to the issue]; that said evidence is new, material to the issue, and not cumulative, nor will it be brought to impeach any evidence or the testimony of any witness who has been heretofore examined in the said action.

III. I did not know of the existence of said evidence at the time of the trial, and could not by the use of reasonable diligence [*or* the utmost diligence] have discovered and produced the same upon the former trial.

[*Jurat.*]

[SIGNATURE.]

61. Affidavit.—Newly discovered evidence relied on to obtain a new trial has no place in a statement. It should be presented in affidavits. (*Beans v. Emanuelli*, 36 *Cal.* 117.) Motions for new trial, on the ground of newly discovered evidence, must be regarded with suspicion and disfavor. In such cases the motion must be supported by the affidavit of the moving party that he did not know the newly discovered evidence. (*Baker v. Joseph*, 16 *Cal.* 180; *Leonard v. Skuler*, 34 *Mo.* 475.) And usually by the affidavits of the newly discovered witnesses, showing what they know and will testify. (2 *How. Miss.* 772.) And must set forth the testimony. (*Ruddick v. Ruddick*, 21 *Ind.* 163; *House v. Wright*, 22 *Ind.* 383.) The affidavit of the party cannot be received in lieu of the affidavits of such witnesses, unless, for good cause shown, it appears that the affidavits of the latter cannot be obtained in time, or in such further time as may have been granted for that purpose. (*Arnold v. Skaggs*, 35 *Cal.* 684.) Witness's affidavit must be produced, or proof that it cannot be obtained. (*Rogers v. Huie*, 1 *Cal.* 433; *Jenny Lind Co. v. Bowers*, 11 *Cal.* 194; *Den v. Morrell*, 1 *Hall*, 382; *Smith v. Cushing*, 18 *Wis.* 295.) Or a sufficient excuse be furnished for its absence. (*Smith v. Cushing*, 18 *Wis.* 295.) Or time be obtained for its production. (*Jenny Lind Co. v. Bowers*, 11 *Cal.* 194.) The best possible proof must be adduced of the existence of the newly-discovered evidence. (*Smith v. Cushing*, 18 *Wis.* 295.) If the affidavit states that the new witness merely "told" the party the facts relied on, it is insufficient. *Shumway v. Fowler*, 4 *Johns.* 425.

62. Diligence must be Shown.—To justify a new trial on this ground, it must be shown: *First*, That the party moving used

reasonable diligence to discover and produce the evidence on a former trial, and that his failure to do so was not the result of his own *laches*. (10 *Wend.* 285; 1 *Cow.* 359; *Arnold v. Skaggs*, 35 *Cal.* 684; *Rogers v. Huie*, 1 *Cal.* 429; *Baker v. Joseph*, 16 *Id.* 173; *Howard v. Winters*, 3 *Nev.* 539; *Hanly v. Blanton*, 1 *Mo.* 49; *Hollingsworth v. Napier*, 3 *Cal.* 182; *Williams v. Baldwin*, 18 *Johns.* 489; compare *Kenrick v. Delafield*, 2 *Cai.* 67; *Vanderwoort v. Smith*, 2 *Cal.* 155; *Palmer v. Mulligan*, 3 *Cai.* 307; *Jackson v. Malin*, 15 *Johns.* 293; *People v. Mack*, 2 *Park. Cr.* 673; *People v. N.Y. Superior Court*, 10 *Wend.* 285; *Flemming v. Hollenback*, 7 *Barb.* 271; *May v. De Wolf*, 3 *Woodb. & M.* 193; *Aiken v. Bemis*, *Id.* 348; *Whitmore v. Murdock*, *Id.* 380; 5 *Wend.* 115; *Gray. & Watt. on New Trial*, 489; *Leavy v. Roberts*, 8 *Abb. Pr.* 310; 2 *Hilt.* 285; *Thayer v. Stevens*, 44 *N.H.* 484; *Fellows v. Emperor*, 13 *Barb.* 92; *Best v. Starks*, 24 *How. Pr.* 58; *People v. Marks*, 10 *How. Pr.* 261; 2 *Park. Cr.* 673; 10 *Wend.* 285; *De Lima v. Glassell*, 4 *Hen. & M.* 369; *Floyd v. Jayne*, 6 *Johns. Ch.* 479; *Campbell v. Genet*, 2 *Hilt.* 290; *Washburne v. Gould*, 3 *Storv C. Ct.* 122; *Palmer v. Fisk*, 2 *Curt. C. Ct.* 14; *Prevost v. Gratz*, *Pet. C. Ct.* 364; *Garrison v. United States*, 2 *Ct. of Cl. (Nott. & H.)* 382; *Fikes v. Bentley*, *Hempst. U.S.* 61; *Dickson v. Matthews*, *Id.* 65; *Coote v. Bank of United States*, 3 *Cranch C. Ct.* 95; *Leschi v. Terr. of Wash.*, *Wash. Terr.* 23; *Nininger v. Knox*, 8 *Minn.* 140; *Arthur v. Chavis*, 6 *Rand. U. S.* 142; *Doubleday v. Makepeace*, 4 *Blackf.* 9; *Carson v. Cross*, 14 *Iowa*, 463.) That the strictest diligence is required, (*Levitsky v. Johnson*, 35 *Cal.* 41.) And the application should state what diligence was used. (*Burnley v. Rice*, 21 *Tex.* 171; *Edmiston v. Garrison*, 18 *Wis.* 594.) Absence from State being no excuse for want of diligence. *Id.*

63. Diligence.—A new trial will not be granted when the discovered evidence is alleged to be a deed recorded in the County Recorder's office a year before the trial, and a record of a judgment in the same court in which the cause was tried. (*Weimar v. Lowery*, 11 *Cal.* 104; *Vardeman v. Edwards*, 21 *Tex.* 737.) If materiality is discovered during trial, continuance should be asked for, or new trial will be refused. (*Berry v. Metzler*, 7 *Cal.* 418; *Klockenbaum v. Pierson*, 22 *Id.* 160.) But where a witness on the former trial did not disclose all the knowledge he had relative to the facts, it is not ground for a new trial. *Davis v. Presler*, 5 *S. & M.* 459.

64. Not Cumulative.—It must be shown, *second*, that it is *new*

material and not cumulative. (Bartlett v. Hogden, 3 Cal. 55; Brooks v. Lyon, *Id.* 113; Burritt v. Gibson, *Id.* 396; Live Yankee Co. v. Oregon Co., 7 *Id.* 42; Taylor v. Cal. Stage Co., 6 *Id.* 228; Gaven v. Dopman, 5 *Id.* 342; Klockenbaum v. Pierson, 22 *Id.* 160; Spencer v. Doane, 23 *Id.* 418; Aldrich v. Palmer, 24 *Id.* 513; Cutler v. Steamer "Columbia," 1 *Or.* 101; Howard v. Winters, 3 *Nev.* 539; McDaniel v. Will, 2 *Bibb.* 550.) If merely cumulative, it is no ground for a new trial. See above authorities; also, 3 *Nev.* 539; 10 *Wend.* 285; 1 *Cow.* 359; Levistky v. Johnson, 35 *Cal.* 41; Baker v. Joseph, 16 *Id.* 180; Spencer v. Doane, 23 *Id.* 418; Aldrich v. Palmer, 24 *Id.* 513; Stoakes v. Monroe, 36 *Id.* 383; Cox v. Hutchings, 21 *Ind.* 219; Sturgeon v. Ferron, 14 *Iowa*, 160; Wilhelm v. Thorington, *Id.* 537; Hoomes v. Kuhn, 4 *Call. U.S.* 274; Hare v. Sproul, 2 *How. Miss.* 772; Fellows v. Emperor, 13 *Barb.* 92; Flemming v. Hollenback, 7 *Id.* 271; People v. N.Y. Sup. Ct., 10 *Wend.* 285; Pike v. Evans, 15 *Johns.* 210; Smith v. Brush, 8 *Id.* 84; Steinback v. Columbia Ins. Co., 2 *Cai.* 129; Halsey v. Watson, 1 *Id.* 24; Powell v. Jones, 42 *Barb.* 24; Edmiston v. Garrison, 18 *Wis.* 594; Beauchamp v. Sconce, 12 *Mo.* 57; State v. Larrimore, 20 *Id.* 425; Wells v. Sanger, 21 *Id.* 354; State v. Stumbo, 26 *Id.* 306; State v. Wightman, 27 *Id.* 121; Whitbeck v. Whitbeck, 9 *Cow.* 266; Brisbane v. Adams, 1 *Sandf.* 195; Burnett v. Phalen, 4 *Bosw.* 622; Leavy v. Roberts, 2 *Hill.* 285; Best v. Starks, 24 *How. Pr.* 58; Aiken v. Bemis, 3 *Woodb. & M.* 348; Whetmore v. Murdock, *Id.* 380; Wheelwright v. Beers, 2 *Hall*, 391; Nason v. Cockroft, 3 *Duer*, 366; Peck v. Hiler, 30 *Barb.* 655; Adams v. Bush, 23 *How. Pr.* 262; Macy v. De Wolf, 3 *Woodb. & M.* 193; Ames v. Howard, 1 *Sumn. (U.S.)* 482.

65. Not Cumulative.—Newly discovered cumulative evidence furnishes no ground for a new trial, unless it is of so controlling a character that it would probably change the verdict. (Windham County Bank v. Kendall, 7 *Rhode Island*, 77; State v. O'Brien, *Id.* 336; Heaton v. Manhattan Ins. Co., *Id.* 502.) The best definition of the term "cumulative evidence" is that in (Parker v. Hardy, 23 *Pick.* 246), viz.: "Cumulative evidence is additional evidence of the same kind to the same point." (Bradish v. State, 35 *Vt.* 452.) That only is cumulative which is in addition to or corroborative of what has been given at the trial. (Gray v. Harrison, 1 *Nev.* 502.) Evidence is cumulative if it supports evidence introduced on the trial to prove facts of secondary importance, the tendency of which was to prove the facts in issue. (Stoakes v. Monroe, 36 *Cal.* 383; Gray v. Harrison, 1 *Nev.* 502.) But if it would bring to light some new fact bearing upon the main issue,

it is not cumulative. (*Gray v. Harrison*, 1 *Nev.* 502.) Evidence which is specifically distinct, and bears upon the issue, is not cumulative, though it may be intimately connected with parts of the other testimony. (*Alger v. Merritt*, 16 *Iowa*, 121.) So, proof that plaintiff had acknowledged settlement of the demand should not be deemed cumulative. (*Guyot v. Butts*, 4 *Wend.* 579.) Nor, in case of *crim. con.*, proof that plaintiff had for some time been living in adultery. *Smith v. Masten*, 15 *Wend.* 270.

66. Not Impeaching.—It must be shown, *third*, that it is not to impeach an adverse witness. (10 *Wend.* 285; 1 *Cow.* 359.) It must go to the merits of the case, and not be such as tends merely to discredit a witness. (*Baker v. Joseph*, 16 *Cal.* 180; *Klockenbaum v. Pierson*, 22 *Cal.* 160; *Deer v. State*, 14 *Mo.* 348; *Meakin v. Anderson*, 11 *Barb.* 215; *Beech v. Tooker*, 10 *How. Pr.* 296; 1 *Abb. Pr.* 297; *Simmons v. Fay*, 1 *E. D. Smith*, 107; *Carr v. Gale*, 1 *Curt. C. Ct.* 384; *United States v. Potter*, 6 *McLean*, 182; *Brooke v. Payton*, 1 *Cranch C. Ct.* 128; *Terr. of Oregon v. Latshaw*, 1 *Or.* 146; *Barrett v. Belsher*, 4 *Bibb. U.S.* 348; *Harrington v. Bigelow*, 2 *Denio*, 109; *Fleming v. Hollenback*, 7 *Barb.* 271; *Shumway v. Fowler*, 4 *Johns.* 425; *Bunn v. Hoyt*, 3 *Id.* 255.) Except in very rare cases, such as where the whole question is one of identity of persons long deceased. To give an opportunity of impeaching the character of a principal witness. (*Jackson v. Kinney*, 14 *Johns.* 186; *Jackson v. Hooker*, 5 *Cow.* 207; *Jackson v. Crosby*, 12 *Johns.* 354.) Nor such as tends to disprove what was sworn to, on a former trial. (*Halsey v. Watson*, 1 *Cai.* 24.) Nor new evidence of a fact controverted at former trial. (*Steinback v. Columbian Ins. Co.*, 2 *Cai.* 129; *Smith v. Brush*, 8 *Johns.* 84; *Pike v. Evans*, 15 *Id.* 210; *Leavy v. Roberts*, 8 *Abb. Pr.* 310; *People v. N.Y. Superior Ct.*, 10 *Wend.* 286; *Brisbane v. Adams*, 1 *Sandf.* 195; *Fleming v. Hollenback*, 7 *Barb.* 271; *Peck v. Hiler*, 30 *Barb.* 655.) New evidence on points formerly in issue must be of preponderating character, and decisive on the evidence to be overturned. (*Findley v. Nancy*, 3 *Monr.* 400.) But where the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery. (*Wright v. Carillo*, 22 *Cal.* 595.) But where the defense was forgery in an action on a note, a new trial was granted on the ground that the note, which at the time of the trial was lost, had since been found. (*Platt v. Munroe*, 34 *Barb.* 291.) Admissions and conversations of a defendant, the purport of which is in direct conflict with his testimony in the case, and

with the theory of his defense, are not impeaching but original evidence. *Alger v. Merritt*, 16 *Iowa*, 121.

67. That it is Material.—It must be shown, *fourth*, that it is material to the issue; (10 *Wend.* 285; 1 *Cow.* 359; *Arnold v. Skaggs*, 35 *Cal.* 684;) and of so important a character as to satisfy the Court that it may reasonably be inferred the verdict would have been different if it had been in on the former trial; (*Stoakes v. Munroe*, 36 *Cal.* 383; *State v. Lock*, 26 *Mo.* 603; *Barrett v. Belshee*, 4 *Bibb. U.S.* 348; *Vandeman v. Edwards*, 21 *Tex.* 737;) or that it would materially vary the complexion of the cause. (*Levitsky v. Johnson*, 35 *Cal.* 41; *United States v. Cornell*, 2 *Mas. U.S.* 91; *Leivellen v. Parker*, 4 *Harr. Rep.* 5; *Ludlow v. Parker*, 4 *Hammond*, 5; *Martin v. Marvin*, *D. C. Phil'a* 9 *Leg. Int.* 2.) Where a referee, after report had been made up, refused, from doubt as to his powers, to allow the introduction of newly discovered evidence, at the same time intimating in a supplemental report that if such evidence had been adduced on the trial the result would probably have been different: *Held*, to be good ground for a new trial. *Hoyt v. Saunders*, 4 *Cal.* 345.

68. That it was Subsequently Discovered.—The moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not sufficient. (*Arnold v. Skaggs*, 34 *Cal.* 684.) A new trial for this cause is never granted if the existence of the new evidence was known to the applicant before the trial was had. (*Jackson v. Malin*, 15 *Johns.* 293; *Vandervoort v. Smith*, 2 *Cai.* 155; see *People v. N. Y.*, 10 *Wend.* 285; *Fleming v. Hollenback*, 7 *Barb.* 271; *Macy v. DeWolf*, 3 *Woodb. & M.* 193; *Aiken v. Bemis*, *Id.* 348; *Whetmore v. Murdocks*, *Id.* 380; compare *Porter v. Talcott*, 1 *Cow.* 359.) Even though he had forgotten it at the time of the trial. *Fleming v. Hollenback*, 7 *Barb.* 271; 10 *Wend.* 285.

69. What Statement must Show.—Motions for new trial on the ground of newly discovered evidence are regarded with disfavor and distrust, and the strictest showing of diligence and all other facts necessary is required. (*Baker v. Joseph*, 16 *Cal.* 173; *Smith v. Mathews*, 6 *Mo.* 600; *Leavy v. Roberts*, 8 *Abb. Pr.* 310.) A party who relies on such ground must make a strong case by the best evidence obtainable, both in respect to diligence on his part in preparing for the trial, and as to the truth and materiality of the newly discovered evidence. (*Arnold*

v. Skaggs, 35 *Cal.* 684.) To justify a court in granting a new trial on the ground of newly discovered evidence, it must be manifest that injustice has been done the party moving. (*United States v. Cornell*, 2 *Mas. U.S.* 91; *Crary v. Sprague*, 12 *Wend.* 41.) But the following cases state a less stringent rule. *Clark v. Crandall*, 3 *Barb.* 613; *McGuire v. O'Halloran*, *Hill & D. Supp.* 85.

70. What Statement must Show.—On motion for a new trial on the ground of newly discovered evidence, the newly discovered evidence should be fully set forth. (*Perry v. Cochran*, 1 *Cal.* 180; *Hollingsworth v. Napier*, 3 *Cai.* 182; *Burnley v. Rice*, 21 *Tex.* 171.) Nor will a new trial be granted if the witnesses whose testimony is sought to be introduced are unworthy of belief. (*Fleming v. Hollenback*, 7 *Barb.* 271; *Macy v. DeWolf*, 3 *Woodb. & M.* 193; *Whetmore v. Murdock*, *Id.* 380; *Williams v. Baldwin*, 18 *Johns.* 489; see *Pomroy v. Columbian Ins. Co.*, 2 *Cai.* 260.) Nor if it is improbable that they could be obtained at the new trial. (*Kendrick v. Delafield*, 2 *Cai.* 67.) Nor if they could not be compelled to testify as to the facts sought to be proved by them. (*Shumway v. Fowler*, 4 *Johns.* 425.) Nor, especially, if the new evidence is not material. (*Fellows v. Emperor*, 13 *Barb.* 92.) In contesting a motion for a new trial on the ground of newly discovered evidence, it is competent for the adverse party to show by affidavit that the witness whose testimony is stated is wholly unworthy of credit. (*Williams v. Baldwin*, 18 *Johns.* 489; *Fleming v. Hollenback*, 7 *Barb.* 271; *Pomroy v. Columbian Ins. Co.*, 2 *Cai.* 260.) Counter affidavits may be read without being served on the party moving. *Strong v. Platner*, 5 *Cow.* 21.

No. 1040.

Affidavit on Ground of Excessive Damages.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. I am the defendant in the above entitled action.

II. The verdict of the jury in this action was against the defendant therein, and was for an amount obviously

excessive and unreasonable, and totally unjustifiable from the facts stated and the evidence adduced therein.

III. The complaint in said action called for a recovery of dollars, with interest thereon at the rate of, whereas the verdict of the jury was against the defendant for dollars, with interest thereon at the rate of [*or show any facts or circumstances which constitute the verdict obviously excessive or obviously inadequate.*]

[SIGNATURE.]

[*Furat.*]

71. Affidavit Essential.—In an affidavit on motion for a new trial on the ground of excessive damages, the facts should be stated from which the Court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim. (*Patterson v. Ely*, 19 *Cal.* 28.) In Missouri, he must allege that the verdict is unjust, and that he has merits. (*Meecham v. Judy*, 4 *Mo.* 361; *Elliot v. Leak*, *Id.* 540.) If damages are excessive, it is incumbent on the appellant to specify in his statement, on motion for a new trial, in what respect the evidence was insufficient to support this portion of the finding, or wherein, or for what reason, the damages were excessive. *Chiarini v. Rochon*, *Cal. Sup. Ct., Oct. T.*, 1869.

72. Grounds for New Trial.—The Court will set aside a verdict where the damages given are unjustifiable. (*George v. Law*, 1 *Cal.* 363; *McDaniel v. Baca*, 2 *Cal.* 326; *Heath v. Lent*, 1 *Id.* 410; *Potter v. Seale*, 5 *Id.* 410; *Payne v. Pacific Mail S.S. Co.*, 1 *Id.* 33; *De Briar v. Minturn*, 1 *Id.* 450; see the case of *Pleasants v. N. B. and M. R.R. Co.*, 34 *Id.* 586; *Baldrige v. Bryan*, 3 *Mo.* 371; *Gleason v. Breman*, 50 *Me.* 222.) It must clearly appear that injustice has been done. (*Weaver v. Page*, 6 *Cal.* 681; *Conrad v. Belt*, 22 *Mo.* 166; *Sherry v. Freckling*, 4 *Duer*, 452; *Woodward v. Paine*, 15 *Johns.* 493; *Scott v. Lilienthal*, 9 *Bosw.* 224.) Or, for a greater sum in damages than is asked for in the complaint, a new trial may be had. (*Palmer v. Reynolds*, 3 *Cal.* 396; *Pratt v. Blakey*, 5 *Mo.* 205; *Goetz v. Ambs*, 22 *Id.* 170; *Dox v. Dey*, 3 *Wend.* 356; *Corning v. Corning*, 6 *N.Y.* 97;

McIntire v. Clark, 7 *Wend.* 330; *per contra*, as to amount claimed in writ, Webb v. Thompson, 23 *Ind.* 428.) But the excess may be remitted and the judgment stand. (Pierce v. Payne, 14 *Cal.* 420; McLaughlin v. Wash. Mut. Ins. Co., 23 *Wend.* 525; Jansen v. Ball, 6 *Cow.* 628; Sturgis v. Law, 3 *Sandf.* 451; Fink v. Bryden, 3 *Johns.* 245; Diblin v. Murray, 3 *Sandf.* 19; Collins v. Albany and Schenectady R.R. Co., 12 *Barb.* 492; Clapp v. Hudson River R.R. Co., 19 *Id.* 461; Johnson v. Root, 2 *Fish U.S.* 291.) If the successful party consents. (Chapman v. Browne, 8 *Cal.* 294; Potter v. Thompson, 22 *Barb.* 87.) Or, where verdict is grossly inconsistent with relation to the facts, a new trial will be granted. Potter v. Seale, 5 *Cal.* 410; Scherpf v. Szadeczky, 1 *Abb. Pr.* 366; Knight v. Wilcox, 18 *Barb.* 212; Blum v. Higgins, 3 *Abb. Pr.* 104; Fry v. Bennett, 9 *Abb. Pr.* 45; Krom v. Schoonmaker, 3 *Barb.* 647; Clapp v. Hudson River R.R. Co., 19 *Id.* 461; Rogers v. Beard, 20 *How. Pr.* 98.

73. Grounds for New Trial.—Courts have a legal right to grant new trials in actions for torts on the ground of excessive damages. (Parker v. Lewis, *Hempst.* 72.) So, in infringement of patents, they must be for a sum plainly exorbitant or "outrageous." (Aiken v. Bemis, 3 *Woodb. & M.* 348; Whitney v. Emmett, *Bald.* 303, 325; Davis v. Pitman, *Hempst. U.S.* 44.) So, in action against a common carrier for negligent loss of property. (Harris v. Panama R.R. Co., 5 *Bosw.* 312.) The Court may correct the judgment as to damages, and make it conformable to the findings. (Clark v. Huber, 20 *Cal.* 196; Toplitz v. Raymond, 10 *Abb. Pr.* 60.) Yet, when the finding is contrary to the evidence, and in direct contravention of the charge of the Judge, a new trial will be granted. (Johnson v. Root, 2 *Fish*, 291.) So, the Court may grant a new trial where the damages are inadequate, as well as where they are excessive. Hall v. Bark "Emily Banning," 33 *Cal.* 522; Richards v. Sandford, 2 *E.D. Smith*, 349; Robbins v. Hudson River R.R. Co., 7 *Bosw.* 1; Moore v. Wood, 19 *How. Pr.* 405; Walker v. Smith, 1 *Wash. C. Ct.* 202; Mostyn v. Coles, 7 *Hurl. & Nor.* 872; Adams v. Midland R.R. Co., 7 *Hurl. & Nor.* 1,034.

74. Insufficient Grounds.—It is no ground for a new trial of the issues of fact that the judgment is broader than the facts alleged and found would justify. Such an error does not affect the findings where it occurred in entering the judgment subsequent to the findings. (*Cal. Pr. Act*, § 193; Shepard v. McNeil, *Cal. Sup. Ct., Jul. T.*, 1869.) Court will not interfere with the verdict, unless the damages found are

obviously excessive. (*Woodson v. Scott*, 20 *Mo.* 272; *Barth v. Merritt*, *Id.* 567; *Wells v. Sanger*, 21 *Id.* 354; *Anderson v. Fox*, 2 *Hen. & M.* 245.) The Court will not grant a new trial on the ground of excessive damages, when the verdict was in accordance with the direction of the Court. (*Stimpson v. The Railroads*, 1 *Wall. jr. C. Ct.* 164; *Stanley v. Whipple*, 2 *McLean*, 35.) Or where the defendant leaves the matter to general inference. (*Stephens v. Felt*, 2 *Blatchf. U.S.* 37.) Or where the claim for damages rests entirely on the uncontroverted allegations of the complaint, judgment will not be disturbed. (*Patterson v. Ely*, 19 *Cal.* 28.) Or where defendants admit that the amount claimed is correct. (*Rowe v. Smith*, 10 *Bosw.* 268; *N. O. R.R. Co. v. McBride*, 38 *Miss.* 32.) Or that the verdict was entered for the amount due instead of the penalty of the bond, and that the recovery was for a sum greater than was claimed by the *ad damnum* in the declaration, were not sufficient for a new trial. *Huff v. Hutchinson*, 14 *How. U.S.* 585.

75. Rules Governing Courts.—The question of damages or of interest in the nature of damages belongs peculiarly to the jury, and although the Court may be dissatisfied with the verdict, they will not set it aside simply on that ground. (*Walker v. Smith*, 4 *Dall. U.S.* 389; 1 *Wash. C. Ct.* 152; *Allen v. Blunt*, 2 *Woodb. & M.* 121, 149.) It must be very extreme cases where the judgment will be reversed by the Supreme Court on account of excessive damages in actions *ex delicto*. *Hagg v. Emerson*, 11 *How. Pr.* 587; *Smith v. Jordan*, 11 *Law Rep. (N.S.)* 204; *Walker v. Wilson*, 8 *Bosw.* 586.

76. Rules of Court.—In actions for personal torts, the law does not fix any precise rule of damages, but leaves their assessment to the unbiased judgment of the jury, and the verdict will not be disturbed on motion for new trial, unless the amount is so large as to induce a reasonable person, upon hearing the circumstances, to declare it outrageously excessive, or as to suggest at the first blush, passion or prejudice or corruption on the part of the jury. *Wheton v. North Beach and M. R.R. Co.*, 36 *Cal.* 590; *Seeley v. Chittenden*, 4 *How. Pr.* 265; *Boyce v. Cal. Stage Co.*, 25 *Cal.* 460; *Aldrich v. Palmer*, 24 *Cal.* 513; *Parker v. Lewis*, *Hempst. U.S.* 72; *Clark v. Richards*, 3 *E. D. Smith*, 89; *Coleman v. Southwick*, 9 *Johns.* 45; *Southwick v. Stevens*, 10 *Id.* 443; *McConnell v. Hampton*, 12 *Johns.* 234; *Sargent v.*, 5 *Cow.* 106; *Moody v. Baker*, *Id.* 351; *Cole v. Perry* 8 *Cow.* 214; *Douglas v. Towsey*, 2 *Wend.* 352; *Finch v. Brown*, 13

Cow. 601; *Bump v. Betts*, 23 *Cow.* 85; *Knight v. Wilcox*, 18 *Barb.* 212; *Capp v. Huds. Riv. R.R. Co.*, 19 *Id.* 461; *Curtis v. Rochester and Syracuse R.R. Co.*, 20 *Barb.* 282; *Travis v. Barger*, 24 *Id.* 614; *Hager v. Danforth*, 8 *How. Pr.* 435; *Blum v. Higgings*, 3 *Abb. Pr.* 104; *Marquissee v. Ormston*, 15 *Wend.* 368; *Fry v. Bennett*, 9 *Abb. Pr.* 45; *Thurston v. Martin*, 5 *Mass.* 496; *Alden v. Dewey*, 1 *Story C. Ct.* 336; 3 *Law Rep.* 383; *Allen v. Blunt*, 2 *Woodb. & M.* 121, 149; *Palmer v. Fiske*, 2 *Curt. C. Ct.* 14; *Stanley v. Whipple*, 2 *McLean*, 35; *St. Martin v. Desnoyer*, 1 *Minn.* 156; *Swann v. Bowie*, 2 *Cranch C. Ct.* 221; *St. Paul v. Ruby*, 8 *Minn.* 154.

77. Rules of Court.—It is only in rare cases that the Court will grant a new trial in an action for libel and slander, on this ground. (*Potter v. Thompson*, 22 *Barb.* 87; *Tillotson v. Cheetham*, 2 *Johns.* 63; *Root v. King*, 7 *Cow.* 613; *Ostorm v. Calkins*, 5 *Wend.* 263; *Ryckman v. Parkins*, 9 *Id.* 470; *Cook v. Hill*, 3 *Sandf.* 341.) Other cases: (*Smith v. Masten*, 15 *Wend.* 270; *Scherpf v. Szadeczky*, 1 *Abb. Pr.* 366.) Rules by which courts are governed in setting aside verdicts on the ground of excessive damages, see *Payne v. Pacific Mail S.S. Co.*, 1 *Cal.* 33; see *Rogers v. Beard*, 20 *How. Pr.* 98; and *Mackey v. N.Y. Cent. R.R. Co.*, 27 *Barb.* 529.

78. What must be Shown.—It must be clearly shown that the damages are excessive and unreasonable. (*Russ v. War Eagle*, 14 *Iowa*, 363; *Allen v. Blunt*, 2 *Woodb. & M.* 121, 149.) The facts should be stated from which the Court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim. (*Patterson v. Ely*, 19 *Cal.* 28.) If the statement shows that too high a rate of interest was allowed by the jury upon an account sued on, for a part of the time, a new trial will be granted unconditionally, unless it appears that plaintiff had not kept his account for the residue of the time upon the erroneous basis of interest, and he will consent to remit the excess. (*Clark v. Girdley*, 35 *Cal.* 398.) Circumstances must show that the jury have made some mistake in the rules of law applicable, or in their mode of computation, or that they have been actuated by passion or prejudice or some improper feeling. *Weaver v. Page*, 6 *Cal.* 685; *McCarty v. Fremont*, 23 *Cal.* 196; *Aldrich v. Palmer*, 24 *Id.* 513; *Boyce v. California Stage Co.*, 25 *Id.* 460.

*No. 1041.**Statement on Motion for New Trial.*

[TITLE.]

This is an action of ejectment for a parcel of land described in the complaint herein [being a portion of a tract of land chains square, called the claim, lying on the north side of the road leading from to].

The cause being regularly called, was tried before the Court, without a jury, on the day of, 18... The defendant moved for judgment on the pleadings, which motion was denied, and thereupon the following evidence was introduced:

M. N., called, and sworn for plaintiff, testified as follows, etc. [*insert testimony.*]

Cross-examined, etc.

O. P., called, and sworn for plaintiff, testified as follows, etc. [*insert testimony.*]

Cross-examined, etc.

Book of surveys shown witness, and identified. Plat in said book introduced. Deed shown witness; knows the signature. Deed introduced marked "Exhibit No. 1;" defendant excepted.

Cross-examined, etc.

Recalled, examined, says, etc.

Cross-examined, says, etc.

It was here admitted that [*state admission*]; the plaintiff offered and read in evidence a deed marked

"Exhibit No. 2," dated, from to, for [*the land in contest*]; defendant excepted. Also deed marked "Exhibit No. 3," dated, from to, for acres, including the premises in question. Also deed marked "Exhibit No. 4," dated, from to, for acres, including the premises in suit. Which deeds were all admitted and read in evidence.

Plaintiff also offered and read in evidence deposition of, on file in this cause, and made a part of this statement. [*State in like manner the evidence introduced on behalf of defendant.*]

ERRORS OF LAW.

I. The Court erred in denying defendant's motion for judgment on the pleadings.

II. The Court erred in admitting in evidence said deed of to, dated, marked "Exhibit No. 1," there being no seal affixed thereto, and the acknowledgement thereof being defective.

III. The Court erred in admitting in evidence said deed of to, dated, of the land shown to be the homestead property of and his wife, without the signature and acknowledgement of the wife.

IV. The Court erred in refusing to allow defendant to prove that he had no knowledge in fact at the time of his purchase of the prior deed made by to

V. The Court erred in refusing to allow defendant to prove that he actually held, possessed, and occupied

the demanded premises continuously and adversely, from the day of, 18..., to the day of, 18..., claiming the same in his own right adversely to all the world, including

79. Discretion of Court.—Where there is an insufficiency of evidence to sustain the verdict, a new trial may be granted. It rests in the discretion of the Court. (*Johnson v. Pendleton*, 1 *Cal.* 133; *Ritchie v. Bradshaw*, 5 *Id.* 228; *Adams v. Pugh*, 7 *Id.* 150; *Potter v. Carney*, 8 *Cal.* 574; *Scannell v. Strahle*, 9 *Id.* 177; *Weddle v. Stark*, 10 *Id.* 301; *Johnson v. Parks*, 10 *Id.* 446; *Brown v. Smith*, *Id.* 508; *Kimball v. Gearhart*, 12 *Id.* 27; *Bensley v. Atwill*, *Id.* 240; *Ritter v. Stock*, *Id.* 402; *McGarrity v. Byington*, *Id.* 432; *Visher v. Webster*, 13 *Id.* 60; *Knowles v. Joost*, *Id.* 620; *Algier v. Steamer "Maria"*, 14 *Id.* 167; *Stevens v. Irwin*, 15 *Id.* 104; *Gagliardo v. Hoberlin*, 18 *Id.* 394; *Lewis v. Covillaud*, 21 *Id.* 178; *Oullahan v. Starbuck*, 21 *Cal.* 413; *Tebbs v. Weatherwax*, 23 *Id.* 58; *Preston v. Keys*, 23 *Id.* 193; *Lubeck v. Bullock*, 24 *Id.* 388; *Ellis v. Jeans*, 26 *Id.* 275; *Wilcoxon v. Burton*, 27 *Id.* 232; *Wilkinson v. Parrott*, 32 *Id.* 102.) Where jury renders a verdict against the plain principles of law, as laid down by the Court, and against clear and unquestioned evidence, the Court will grant a new trial, notwithstanding the particular circumstances or general justice of the case. *United States v. Duval*, *Gilp.* 356.

80. Error in Admitting Evidence.—Where improper evidence is submitted to the jury under objection, a new trial will be granted. (*Innis v. Stmr. "Senator"*, 1 *Cal.* 459; *Santillan v. Moses*, 1 *Cal.* 193; *Trigg v. Conway*, *Hempst. U.S.* 538; *Walpole v. Renfroe*, 16 *La. An.* 92; *Consequa v. Willings*, *Pet. C. Ct.* 225; *Brown v. Cummings*, 7 *Allen (Mass.)* 507.) Injury is presumed from evidence erroneously admitted. (*Grimes v. Fall*, 15 *Cal.* 63; *Weber v. Kingsland*, 8 *Bosw.* 415.) And it must be shown to be irrelevant and injurious to the party objecting. (*Coghill v. Boring*, 15 *Cal.* 213.) Unless such evidence could not possibly have affected the jury prejudicial to the appellant; (*Innis v. Stmr. "Senator"*, 1 *Cal.* 459; *Santillan v. Moses*, *Id.* 93; *Coghill v. Boring*, 15 *Cal.* 213; *Hicks v. Whiteside*, 23 *Id.* 404; *Barton v. City of Syracuse*, 37 *Barb.* 292;) or, unless it satisfactorily appears that the verdict would not have been changed; (*Prince v. Shepard*, 9 *Pick.* 176; *Thompson v. Lothrop*, 21 *Pick.* 340;) trial should be granted.

(5 *Mass.* 104; *Green v. Hudson River R.R. Co.*, 32 *Barb.* 25; *Gillett v. Mead*, 7 *Wend.* 193; *Ames v. Potter*, 7 *R.I.* 265; *Bridier v. Tulee*, 9 *Fla.* 481; *Patton v. Gregory*, 21 *Tex.* 513; *Field v. Avery*, 17 *Wis.* 672; *Ellis v. Short*, 21 *Pick.* 142; *Buddington v. Shearer*, 2 *Pick.* 427; *Potter v. Tyler*, 2 *Met.* 58.

81. Error in Admitting Evidence.—And where the evidence was conflicting, the admission of any incompetent evidence which might possibly prejudice ought not to be overlooked. (*Whitney v. Otis*, 1 *Bosw.* 420.) But a new trial will not lie where there is sufficient competent evidence to justify the judgment. (*Melton v. Cobb*, 21 *Tex.* 539; *Holbrook v. Jackson*, 7 *Cush.* 136.) Or where the evidence conflicts with the complaint. (*Jones v. Fales*, 4 *Mass.* 254; *Cunningham v. Kimball*, 7 *Id.* 65.) Or if there is uncontradicted evidence sufficient to warrant the verdict of the jury. (*Union Water Co. v. Crary*, 25 *Cal.* 504; *Zeigler v. Wells*, 28 *Cal.* 263; *Renaud v. Peck*, 2 *Hill.* 137; *Allen v. Blunt*, 2 *Woodb. & M.* 121, 152, 154; *Doane v. Baker*, 6 *Allen (Mass.)* 260; *Hollingshead v. Nauman*, 45 *Penn. State R.* 140; *Richardson v. Warren*, 6 *Allen (Mass.)* 552.) Or if the objection was merely technical. (*Dovendorf v. Wert*, 42 *Barb.* 227; *Allen v. Blunt*, 2 *Woodb. & M.* 121, 152, 154.) And its rejection was right. (*Id.*) Or no injustice was done by it. (*Id.*) Or if it was cumulative. (*Butterworth v. Warth*, 4 *Bosw.* 624.) Or not controverted. (*Id.*; *Allen v. Blunt*, 2 *Woodb. & M.* 121.) Or where it is afterwards made competent. (*Eastman v. Amoskeag Co.*, 44 *N.H.* 143; *Lyford v. Thurston*, 16 *N.H.* 399.) Or where the fact to be proved is mere surplusage, or not material to the decision of the action. (*Clark v. Lockwood*, 21 *Cal.* 220; *Mills v. Barney*, 22 *Id.* 240; *Allen v. Blunt*, 2 *Woodb. & M.* 121, 152, 154.) Or was not in issue. (*Union Water Co. v. Crary*, 25 *Cal.* 504.) Or, where its admission has not prejudiced the case. (2 *T.R.* 4; 1 *Taunt.* 12; 12 *Price*, 125; 1 *Bos. & Pul.* 338; 2 *Bing.* 483; 2 *Pick.* 310; 10 *Johns.* 447; 6 *Cowen*, 118; *Matter of Marsh*, 6 *Law Rep.* 67; *Allen v. Blunt*, 2 *Woodb. & M.* 121.) Or could not have injured the defendant. (*Dimmick v. Milwaukie R.R. Co.*, 18 *Wis.* 471.) Or does not bear upon the question decided. (*Barry v. Bennett*, 7 *Met.* 354.) Or where the Court instructs the jury to disregard such evidence. (*Union Water Co. v. Crary*, 25 *Cal.* 504; *Randolph v. Woodstock*, 35 *Vt.* 291; *Smith v. Whitman*, 6 *Allen (Mass.)* 562; but see *Green v. Hudson River R.R. Co.*, 32 *Barb.* 25.) Or where, under the decision admitting the evidence, no evidence is

shown to have been given. *Randolph v. Woodstock*, 35 *Vt.* 291; *Fowler v. Middlesex*, 6 *Allen*, 92; *Allance v. King*, 3 *Barb.* 548.

82. Error in Admitting Evidence.—If the Court erroneously rules that certain evidence is admissible, the opposite party is not prejudiced thereby, unless the ruling is followed by the introduction of the objectionable testimony. (*Treat v. Reilly*, 35 *Cal.* 129.) A party is not injured by a refusal to strike out exceptionable testimony, if the same party afterwards introduces the same testimony, or if counsel afterwards concedes the facts stated in such testimony. (*Treat v. Reilly*, 35 *Cal.* 129.) If the Court erroneously allows respondent to introduce evidence upon matter not denied in the answer, but the appellant is not prejudiced thereby, a new trial will not be granted. (*Wells v. McPike* 21 *Cal.* 215; *Tully v. Harloe*, 35 *Cal.* 302.) The admission of immaterial evidence to prove a conceded point furnishes no ground for a new trial. (*Sibley v. Leffingwell*, 8 *Allen (Mass.)* 584; *Rand v. Dodge*, 17 *N.H.* 343.) It is no ground for a new trial that secondary evidence was admitted without a foundation for it being laid, if no objection was made to it. (*Myer v. Avery*, 23 *Ind.* 510.) Or that further evidence was allowed after the testimony was closed. *Mowry v. Starbuck*, 4 *Cal.* 274; *Brooks v. Crosby*, 22 *Cal.* 42; see *Howard v. Holbrook*, 9 *Bosw.* 237.

83. Error in Admitting Evidence.—If the Court refuse to allow an amendment to the answer, but admits evidence on the point to which the amendment referred, no injury results from the refusal. (*Jones v. Block*, 30 *Cal.* 227.) Where a referee erred in receiving certain evidence, yet where such evidence by legal necessity can do no injury, it will not authorize a new trial. (6 *Duer*, 145; 1 *N.F.* 519; 13 *Barb.* 42; 9 *Id.* 625; 6 *Hill*, 292; 19 *Wend.* 232; 3 *Hill*, 194; 16 *Johns.* 90; 3 *Cow.* 612; *Lowery v. Stewart*, 3 *Bosw.* 505.) When a witness is allowed to testify against the objection of a party to a cause, and the Judge does not state the facts on which his opinion in favor of the competency of the witness depends, the parties disagreeing as to the facts, a new trial will be ordered. (*State v. Norton*, 1 *Wins. (N.C.)* 303.) Where the evidence is commented on, compare *Wait v. Maxwell*, 5 *Pick.* 217; *Rice v. Bancroft*, 11 *Id.* 469; *Manson v. Palmer*, 8 *Allen (Mass.)* 551; *Carpentier v. Small*, 35 *Cal.* 346.

84. Error in Excluding Evidence.—When the Court refuses to allow evidence, and plaintiff becomes nonsuited, the judgment of non-

suit may be set aside and a new trial granted. (*Guffey v. Moseley*, 21 *Tex.* 408; *Wilkinson v. Scott*, 17 *Mass.* 249; see *Robinson v. Lyle*, 10 *Barb.* 513; *Snell v. Loucks*, 12 *Barb.* 385; *Ambler v. Wyld*, 2 *Wash. (Va.)* 36.) Where a portion of plaintiff's evidence was excluded, and the court of review comes to the conclusion that if the evidence excluded had been admitted plaintiff could not have recovered, a new trial will not be granted. (*Merle v. Mathers*, 26 *Cal.* 455.) Or where the evidence was afterwards admitted. (*Morgan v. Reid*, 7 *Abb. Pr.* 215.) Or if it is evident that the testimony offered could have no influence upon the verdict. (*Carpenter v. Norris*, 20 *Cal.* 437; *City B'k of Brooklyn v. Dearborn*, 20 *N.Y.* 244; *Allen v. Blunt*, 2 *Woodb. & M.* 121, 152.) Or where defendant suffered no injury thereby. (*Hicks v. Whiteside*, 23 *Cal.* 404; *Morgan v. Reid*, 7 *Abb. Pr.* 215; *Cook v. Litchfield*, 2 *Bosw.* 183; *Hunt v. Fish*, 4 *Barb.* 324.) Or was not prejudiced. (*Wise v. State*, 2 *Kansas*, 419.) Or where conclusive evidence on the same point was subsequently admitted. (*Dupuy v. Williams*, 26 *Cal.* 309; *Park Bank v. Tilton*, 15 *Abb. Pr.* 384.) Or for the exclusion of an affidavit in a foreign language. (*Spencer v. Doane*, 23 *Cal.* 418.) A new trial will be ordered on the improper exclusion of a witness, although it does not appear probable that his testimony could have affected the result. (*Brown v. Richardson*, 20 *N.Y.* 472, 476; reversing *S.C.*, 1 *Bosw.* 402; see, also, *Buck v. Hermance*, 1 *Blatchf.* 322.) The rejection of an unimportant deposition is not of itself alone cause for a new trial. *Hill v. Meyers*, 43 *Penn. St. Rep.* (7 *Wright*) 170.

85. Error of Law.—A new trial will not be granted for an error by which the rights of the party were not prejudiced. (2 *Grah. & M. on New Trial*, 603; 10 *Johns.* 447; 6 *Cow.* 118; 1 *Bos. & Pull.* 338; 2 *Bing.* 483; 2 *Pick.* 310; 2 *T.R.* 4; 1 *Taunt.* 12; 12 *Price*, 625; *Kilburn v. Richie*, 2 *Cal.* 148; *Newberg v. Abrams*, *Wash. Terr.* 209; *Tyler v. Green*, 28 *Cal.* 406; *Carpentier v. Gardiner*, 29 *Cal.* 160; *Huntington v. Conkey*, 33 *Barb.* 218; *Matter of Marsh*, 6 *Law. Rep.* 67; *Eckert v. Cameron*, 43 *Penn. State R.* (7 *Wright*) 120; *McKay v. Leonard*, 17 *Iowa*, 569.) Nor for an error favorable to the appellant. (*Wilkinson v. Parrott*, 32 *Cal.* 102.) A new trial will not be granted where a demurrer to a plea was erroneously sustained when facts could be proved under other pleas. (*Powell v. Asten*, 36 *Ala.* 140.) Nor upon refusal of a nonsuit, in cases where the deficiency was afterwards supplied. (11 *N.Y.* 102; 7 *Johns.* 179; 8 *Foster (N.H.)* 44; 2 *Hill*, 620; 6 *Dana*, 395; *Kent v. Harcourt*, 33 *Barb.* 491.) Nor upon the

refusal to dismiss complaint if evidence was insufficient to be submitted to a jury. (*Howard v. Holbrook*, 23 *How. Pr.* 64.) Nor because a witness was incompetent from interest, if it appears that the interest would probably be released on another trial, and the verdict would be the same. (*Macy v. DeWolf*, 3 *Woodb. & M.* 193.) Nor because counsel indulged in too great latitude, arguing as to inferences to be drawn from evidence. *United States v. Flowery*, 1 *Sprague U.S.* 109; 8 *Law Rep.* 258.

86. Error of Law.—Where the evidence was such as it was peculiarly the right of the jury to decide upon, and where the construction given by the jury to the evidence was consistent with the justice of the case. (*Blagg v. Phenix Ins. Co.*, 3 *Wash. C. Ct.* 58.) Nor where the decision was right, but the reasons for it were not the true ones. (*Munroe v. Potter*, 22 *How. Pr.* 49.) Nor where plaintiff could in no event recover more than nominal damages. (*Hopkins v. Grinnell*, 28 *Barb.* 533; *McConihe v. N.Y. and E. R.R. Co.*, 20 *N.Y.* 495.) Nor for the refusal to nonsuit where defect was afterwards supplied. (*Barrick v. Austin*, 21 *Barb.* 241; *Downing v. Mann*, 3 *E. D. Smith*, 36; see *Gerbier v. Emery*, 2 *Wash. C. Ct.* 413.) Nor on account of an erroneous ruling, when it is seen that the facts cannot be changed, and the facts proved are conclusive in support of the judgment. (*Brown v. Bowen*, 30 *N.Y.* 519.) Nor where the Court erroneously submitted a matter of law to the jury, and the verdict decided it correctly. (*Stokes v. Arey*, 18 *Jones L. (N.C.)* 66; *Willis v. Vallette*, 4 *Met. (Ky.)* 186.) If the Court makes a ruling during the progress of a trial, the party in whose favor the ruling is, is entitled to have the case decided according to the ruling, provided that if the ruling had been against him he might have been able to remove the objection made by the other party. *Carpentier v. Small*, 35 *Cal.* 346.

87. Error in Instructions.—Where an erroneous instruction has been given, which may have influenced the verdict, a new trial will be granted. (*Yonge v. Pacific Mail S.S. Co.*, 1 *Cal.* 353; *Miller v. Stewart*, 24 *Cal.* 502; *Gale v. Wells*, 12 *Barb.* 85; *Hunter v. Ousterhoudt*, 11 *Barb.* 33; *Scott v. Lunt*, 7 *Pet. U.S.* 596; *Rochell v. Phillips*, *Hempst. U.S.* 22; *United States v. Beatty*, *Id.* 487.) For example, instruction on matter of fact. (*Constit. of Cal. Art. vi. Sec. 17*; *Pico v. Stevens*, 18 *Cal.* 376.) Or where the Judge refused instructions on a matter of law. (*Emerson v. Hogg*, 2 *Blatchf. U.S.* 1.) But where such instructions are in favor of defendant, he cannot complain of the

error. (*Gaven v. Dopman*, 5 *Cal.* 342; *Wilkenson v. Parrott*, 32 *Cal.* 102.) Or an error which does not militate against appellant. (*People v. Moore*, 8 *Cal.* 94.) Or injure him. (*Tompkins v. Mahoney*, 32 *Cal.* 231; *Fagan v. Williamson*, 8 *Jones L. (N.C.)* 433; *Hook v. Craghead*, 35 *Mo.* 380; 18 *Q.B.* 93; *Wallace v. Mayor of N.Y.*, 2 *Hill.* 440; 9 *Abb. Pr.* 40; 18 *How. Pr.* 169; *Green v. Hudson Riv. R.R. Co.*, 32 *Barb.* 25.) Or be to his prejudice. (*Pico v. Stevens*, 18 *Cal.* 376; *Olney v. Chadsey*, 7 *R.I.* 224.) Or a mere want of perspicuity in framing the instruction. (*People v. Moore*, 8 *Cal.* 94; *McKinney v. Smith*, 21 *Cal.* 374; *Williams v. Birch*, 6 *Bosw.* 299; *Hooksett v. Amoskeag etc. Co.*, 44 *N.H.* 105.) Or where the jury was not misled by it. (2 *C.B. (N.S.)* 740; *Carrington v. P. M. S. S. Co.*, 1 *Cal.* 475; *Green v. Hudson Riv. R.R. Co.*, 32 *Barb.* 25; *Weber v. Kingsland*, 8 *Bosw.* 415; *Johnson v. Hudson Riv. R.R. Co.*, 20 *N.Y.* 65, 74; *Smith v. N.Y. Cen. R.R. Co.*, 29 *Barb.* 132; *Hamilton Co. v. Goodrich*, 6 *Allen (Mass.)* 191.) Or where justice appears to have been done. *Tram v. Collins*, 2 *Pick.* 145; see 5 *Mass.* 1,101; 6 *Mass.* 350.

88. Error in Instructions.—Where verdict is clearly contrary to the instructions, it will be set aside. (*Farley v. Budd*, 14 *Iowa*, 289.) Where there is no issue tendered in the pleadings upon a material matter, the Court or jury will not be presumed to have found on such matter. (*Gifford v. Carvill*, 29 *Cal.* 589; *Bernal v. Gleim*, 33 *Cal.* 669.) A new trial will not be granted on the ground of erroneous instructions as to measure of damages, if it appear by bill of exceptions that damages assessed were not too great. (*Couillard v. Duncan*, 6 *Allen (Mass.)* 440.) Or where, notwithstanding such instruction, the jury came to the proper understanding, and rendered a correct judgment. (*Haskell v. McHenry*, 4 *Cal.* 411; *Pratte v. Judge Court Comm. Pleas.*, 12 *Mo.* 194; *Eastman v. Amoskeag etc. Co.*, 44 *N.H.* 143; *Marcy v. Shults*, 29 *N.Y. (2 Tiffany)* 346.) Or where no other conclusion could be arrived at from the evidence. *Smith v. Harper*, 5 *Cal.* 329; *Pico v. Stevens*, 18 *Cal.* 376.

89. Error in Instructions.—When a single statement in a judge's charge contains two propositions, one of which is erroneous, Court will order a new trial if it appears the jury was misled thereby. (*Green v. Hudson Riv. R.R. Co.*, 32 *Barb.* 25; *Wilson v. Tatum*, 8 *Jones L. (N.C.)* 300.) The whole charge to the jury should be taken together, and if the case appears to have been fairly presented to the jury the verdict will not be disturbed. (*Carrington v. Pacific M.S.S.*

Co., 1 *Cal.* 475; *Dwinelle v. Henriquez*, 1 *Cal.* 387; *Smith v. Harper*, 5 *Cal.* 329; *Burton v. Merrick*, 21 *Ark.* 357.) Where several defenses are pleaded, either of which is good in law, and the Court errs in its instructions as to one of the defenses, unless it appear that the verdict was rendered on the defense in relation to which no error was committed, a new trial will be granted. (*Wiseman v. McNulty*, 25 *Cal.* 234.) So, where the verdict involves more than one issue, if the charge is erroneous as applied to either issue. (*Whitacre v. Culver*, 8 *Minn.* 133.) Or if there is some evidence, although it may have been slight, upon which the instructions were based. *Perlberg v. Gorham*, 10 *Cal.* 120.

90. Error in Instructions.—Wherever the Court, on a supposed state of facts, instructs the jury if they so find the facts to render a verdict for the plaintiff, when the instruction should have been to find in that event a verdict for the defendant, the remedy, if no exception is taken, is to move on a case for a new trial. (*Brush v. Kohn*, 9 *Bosw.* 589.) If a party desires to call the attention of the Judge to the fact that he was mistaken as to certain evidence having been given as stated in the charge, he should have done so directly and in a way to inform the Judge thereof, and have requested him to admonish the jury that in fact no such evidence had been given, and if the Judge had from misapprehension refused to correct the error, the party prejudiced thereby would be entitled to relief on his motion for a new trial on a case. (*Varnum v. Taylor*, 10 *Bosw.* 148.) If a fact is improperly found, the proper remedy is a new trial. *North Am. Oil Co. v. Forsyth*, 48 *Penn.* 291.

91. Error in Instructions.—Though the rule laid down in a charge was erroneous, and was not excepted to, yet if the jury did not find in conformity to it, a new trial should be granted. (See *Rogers v. Murray*, 3 *Bosw.* 317.) Erroneous instruction, when it will be disregarded, see (*Pico v. Stevens*, 18 *Cal.* 376; *Brooks v. Crosby*, 22 *Cal.* 42; presumed to be erroneous, 24 *Cal.* 339.) The Judge has a right to aid the jury by an expression of his opinion upon the effect of the evidence, but not so as to mislead or control their deliberations; that which a jury have a right to decide ought to be so submitted as to leave them free to decide it either way. (*Mohney v. Evans*, 51 *Penn.* 80.) It is error to charge the jury that the defendant could not relieve himself from responsibility by showing that the repairs were being made by a *contractor*, and not by himself or his servants, to which

the defendant also excepted. *Polack v. McGrath*, *Cal. Sup. Ct.*, *Oct. T.*, 1869.

92. Error in Direction of Verdict.—A new trial will be granted for misdirection of the Judge. (*Battersby v. Abbott*, 9 *Cal.* 565; *Boyden v. Moore*, 5 *Mass.* 364; *Sampson v. Smith*, 15 *Mass.* 365; *Baylies v. Davis*, 1 *Pick.* 206; *Allen v. Blunt*, 2 *Woodb. & M.* 121, 152, 154.) Yet if the misdirection was on an immaterial point, a new trial will not be ordered. (*Id.*) Or if it did not affect the verdict, and justice appears to have been done. (*Id.*) Or if the point was frivolous. (*Id.*) Or where the Judge does not instruct the jury, whether the verdict is or is not against the weight of evidence. (*Page v. Pattee*, 6 *Mass.* 459.) Or where the Judge instructs the jury that the evidence was not "sufficient in law" to maintain the issue. (*Aylwin v. Ulmer*, 12 *Mass.* 22.) In "libel," see *Remington v. Congdon*, 2 *Pick.* 310; *Coffin v. Coffin*, 4 *Mass.* 1.

93. Error in Findings.—Where certain findings are unsupported by any evidence, such findings should be set aside, and a new trial granted. (*Smith v. Atheon*, 34 *Cal.* 506.) If on the trial the Court finds from the evidence all the facts necessary to entitle the plaintiff to recover, and upon re-examination, on motion for new trial, finds that a fact essential to plaintiff's recovery is not proved, a new trial should be granted. (*Hawkins v. Reichert*, 28 *Cal.* 534.) A defense should be specially pleaded; the omission to plead it is not cured by the introduction without objection of evidence in support of it, and the finding of the fact in relation to it by the Court. (*McComb v. Reid*, 28 *Cal.* 281; *Smith v. Owens*, 21 *Cal.* 11.) If the findings follow the issues, and a demurrer would not be sustained to the complaint, judgment will not be arrested on the findings. (*Millard v. Hathaway*, 27 *Cal.* 119.) Nor for inaccuracy in the language of a finding sufficiently distinct as to material question involved. *McKinney v. Smith*, 21 *Cal.* 374.

94. Exceptions must be Taken at the Trial.—Exceptions must be taken to the ruling of the Court. (*McCloud v. O'Neal*, 16 *Cal.* 392; *Turner v. Tuol. Wat. Co.* 25 *Cal.* 398; *State v. Alford*, 31 *Conn.* 40; *Russell v. Union Ins. Co.*, 1 *Wash. C. Ct.* 440; *Farmers' Loan and Trust Co. of N.Y. v. McKinney*, 6 *McLean*, 1; *United States v. Flowery*, 1 *Sprague U.S.* 109; see *Ante*, "Exceptions," p. 496.) But no exception shall be regarded on a motion for a new trial, unless

the exception be material, and affect the substantial right of the parties. *Cal. Pr. Act*, § 188; *Kiler v. Kimball*, 10 *Cal.* 267; *Clark v. Lockwood*, 21 *Id.* 220.) Where a party wishes to put on record, for purposes of review, the decision of the Court on a matter of fact, the only mode is to request that written findings be filed, and on failure or refusal to do so, to except for want of findings. Such decision by the Court on a matter of fact cannot be established by affidavit on motion for new trial. (*Sanchez v. McMahon*, 35 *Cal.* 218; *Jones v. Alexander*, 2 *Mass.* 36.) If a proper case be laid in the declaration, but not with sufficient precision, and the defendant omits to take advantage of the defect at a proper time, the Court, after verdict, will presume that it was supplied by the evidence; but not so, if no ground at all is laid. (*United States v. The "Virgin," Pet. C. Ct.* 7.) So, a new trial will not be granted.

95. Exceptions must be Taken.—If an objection is taken to evidence by counsel, and the objection is overruled by the Court, and no exception is taken to the ruling, the presumption is that the counsel acquiesced in the ruling. (*Turner v. Tuolumne County Water Co.*, 25 *Cal.* 404.) If incompetent testimony is admitted without objection, the Court will treat the testimony as competent on motion for nonsuit, and on motion for new trial. (*Janson v. Brooks*, 29 *Cal.* 214.) The nature of the objections to the admission of evidence must be shown. (*Cox v. Jackson*, 6 *Allen (Mass.)* 108; *State v. Alford*, 31 *Conn.* 40.) So, where a question which ought to have been submitted to the jury was decided by the Court without objection. (*San Francisco v. Clark*, 1 *Cal.* 386; *Clarke v. Mayor of N.Y.*, 24 *How. Pr.* 333.) Or that certain evidence was not admissible. (See *Gates v. Salmon*, 35 *Cal.* 576; *Rathbone v. City Ins. Co.*, 31 *Conn.* 193; see *Ante*, p. 500.) Or where, during the trial, one of the parties was informed of the incompetency of a juror. (*Sleight v. Henering*, 12 *Mich.* 371.) Or that a demurrer to an answer was interposed, and not first disposed of. (*Calderwood v. Tevis*, 23 *Cal.* 335.) Or for the allowance to file an answer after demurrer overruled, (*Thornton v. Borland*, 12 *Cal.* 439). Or that certain instructions should have been given to the jury. (*Rathbone v. City Ins. Co.*, 31 *Conn.* 193; *Brown v. Bristol R.R. Co.*, 7 *Hurl. & Nor.* 1,006; see *Ante*, p. 503.) Or objections to the findings. (See *Ante*, p. 501.) As to consequences of omission to seek review of erroneous finding of fact, by exception or otherwise, (*Fake v. Whipple*, 39 *Barb.* 339.) A report of a referee which is not made immediately after the close of the testimony, by the one hundred and ninety-first section of the Practice Act, is deemed as

excepted to. *Headley v. Reed*, 2 *Cal.* 322; *Matter of the Will of G. D. Bowen*.

96. Legal Effect of Evidence.—But where the jury acted under a mistaken impression as to the legal effect of evidence, or in a total disregard of it, a new trial will be granted. (*Minturn v. Burr*, 20 *Cal.* 48; *Todd v. Boone Co.*, 8 *Mo.* 431; *Fulkerson v. Bollinger*, 9 *Id.* 828; *Wilkinson v. Greely*, 1 *Curt. C. Ct.* 63; *Childs v. Somerset and Kennebeck R.R. Co.*, 10 *Law Rep. (N.S.)* 561.) But not where the construction given by the jury to the evidence appeared to be consistent with the justice of the case. (*Blagg v. Phoenix Ins Co.*, 3 *Wash. C. Ct.* 58.) Where jury found plaintiff was injured by defendant's negligence, and without fault on his part, rendering a verdict for six cents damages, the verdict was set aside as contrary to evidence. (2 *E. D. Smith*, 349; *Robbins v. Hudson River R.R Co.*, 7 *Bosw.* 1; see, also, *Lansing v. Stone*, 37 *Barb.* 15.) A new trial will not be granted on the affidavits of jurors that the jury misapprehended the testimony, where no reasonable ground for such misapprehension appears. *Jack v. Naler*, 15 *Iowa*, 450; *Moffit v. Rogers*, *Id.* 453.

97. New Trial will be Granted.—Where an attorney appears without authority, and conducts the defense, the remedy of defendants is by motion for a new trial, not by motion for relief from the judgment, under Sec. 68 of the Practice Act. (*McKinley v. Tuttle*, 34 *Cal.* 235.) Where judgment is founded in part upon a betting contract, a new trial will be granted. (*Sisk v. Evans*, 8 *Mo.* 52.) Or where verdict is obviously the result of a mistaken view of the rules of law applicable to the facts. (*Todd v. Boone County*, 8 *Mo.* 431; *Fulkerson v. Bollinger*, 9 *Mo.* 828.) Or where referee decided against the weight of evidence, and erred in the application of the rules of law. (*Brown v. Penfield*, 24 *How. Pr.* 64.) If the plaintiff insists on a nonsuit, instead of going to the jury upon the evidence, a new trial will be granted. (*Forbes v. Luyster*, 2 *Hall.* 403.) Or if one of the party's counsel was absent at the trial. (*Yater v. Mullen*, 23 *Ind.* 562; *McKay v. Marine Ins. Co.*, 2 *Cai.* 384; *Post v. Wright*, 1 *Id.* 111.) Or during a portion of the trial. (*Seinback v. Columbian Ins. Co.*, 2 *Cai.* 129.) Or when a particular fact in a cause is found by a jury, to enter judgment for the party against whom it was found, on the ground that the evidence was insufficient to establish it. *North American Oil Co. v. Forsyth*, 48 *Penn.* 291.

98. New Trial Granted.—Where the finding is opposed to the evidence, a new trial will be granted. (*Franklin v. Dorland*, 28 *Cal.* 175; *Smith v. Phelps*, 2 *Cal.* 121; *Griswold v. Sharpe*, 2 *Id.* 23; *Kile v. Tubbs*, 23 *Cal.* 431; *Whitman v. Sutter*, 3 *Id.* 179; *Lyle v. Rollins*, 25 *Cal.* 437; *Oldham v. Henderson*, 4 *Mo.* 295; see *Wilson v. Burks*, 8 *Id.* 446; *Slocum v. Lurty*, *Hempst.* 431; *Zantzinger v. Weightman*, 2 *Cranch. C. Ct.* 478; *Wilson v. Janes*, 3 *Blatchf. U.S.* 227.) But it must be palpably so. *Hunt v. Hunt*, 3 *B. Monr.* 575.) So, if the verdict be contrary to the evidence applicable to one count, but not so as to another count. Or when not sustained by the evidence; (*McCloud v. O'Neill*, 16 *Cal.* 392; *Cox v. Hamilton*, 21 *Texas*, 777;) beyond a reasonable doubt; (*Sheldon v. Hudson River R.R. Co.*, 29 *Barb.* 226.) Or where the evidence has failed to support several material allegations of the complaint. (*Watkins v. Rogers*, 21 *Ark.* 298.) Or where the judgment is not warranted by the evidence. (*Bolton v. Stewart*, 29 *Cal.* 615; *James v. Williams*, 31 *Cal.* 211; Appeal of *Piper*, 32 *Cal.* 530; affirmed in Appeal of *Brooks*, 32 *Cal.* 559.) This rule applies to law and equity cases alike. (*Doe v. Vallejo*, 29 *Cal.* 386.) And to findings by references. (*Brady v. Brown*, 20 *Cal.* 520; *Cappe v. Brizziolara*, 19 *Id.* 607; *Brown v. Penfield*, 24 *How. Pr.* 64.) But the evidence must be such that if questions had been submitted to a jury the Court would set aside the verdict as contrary to evidence. *Moore v. Murdock*, 26 *Cal.* 524.

99. New Trial Granted.—Where the verdict is obtained on improper or incompetent evidence—but it must be objected to at the time to constitute it a ground for new trial. (*McCloud v. O'Neill*, 16 *Cal.* 392; *Hahn v. Van Doren*, 1 *E. D. Smith*, 411; *Anderson v. Busted*, 5 *Duer*, 485; *Travis v. Barger*, 24 *Barb.* 614; *Weeks v. Lowere*, 8 *Barb.* 530; *Clark v. Crandall*, 3 *Barb.* 612; *Dresser v. Ainsworth*, 9 *Barb.* 619; *Boyle v. Coleman*, 13 *Barb.* 42; *Vallance v. King*, 3 *Barb.* 548; *Underhill v. Harlem R.R. Co.*, 21 *Barb.* 489.) Or where there is no evidence upon a point essential to sustain the verdict. (*Cummins v. Scott*, 20 *Cal.* 83; *Jackson v. Sacramento R.R. Co.*, 23 *Cal.* 268; *Doll v. Anderson*, 27 *Cal.* 250; *White v. Clayes*, 32 *Ill.* 325; *Moore v. Woods*, 19 *How. Pr.* 405; *Rathbone v. Stanton*, 6 *Barb.* 141; *Smith v. Tiffany*, 36 *Barb.* 23; *Bailey v. Ellis*, 21 *Ark.* 488; *Backus v. Clark*, 1 *Kans.* 303; 1 *Arnould*. 686, § 255; *Wright v. Orient Ins. Co.*, 6 *Bosw.* 269; compare *Kinsman v. N.Y. Mut. Ins. Co.*, 5 *Bosw.* 460.) Where record does not show a total want of evidence, a new trial will not be granted. (*Memphis Plk. Rd. Co. v. Bauere*,

21 *Ark.* 306.) A verdict for a tenant claiming title by twenty years' possession cannot be sustained without evidence that his possession was adverse to the title of the true owner. (*Eaton v. Jacobs*, 49 *Maine*, 559.) But where a verdict is void for repugnancy or uncertainty. (*Stearns v. Barrett*, 1 *Mas. U.S.* 153; and see *Thompson v. Carberry*, 2 *Cranch. C. Ct.* 39.) Where complaint claims on two distinct grounds, and some decided on one and some on the other. (*Biggs v. Barry*, 2 *Curt. C. Ct.* 259.) Where it was necessary to prove two distinct propositions, and a general verdict of guilty was returned. (*United States v. Smith*, 3 *Blatchf. U.S.* 255; *Wilson v. Latum*, 8 *Jones L. (N.C.)* 300.) Where several counts are abandoned, and the verdict is rendered upon two counts which do not lay a foundation for the damages found by the jury. (*Jones v. Vanzandt*, 2 *McLean*, 611; *S.C.*, 1 *West. Law J.* 56.) Or if one of the counts is defective, or an error has been committed as to one of them. *Wilson v. Tatum*, 8 *Jones N. (N.C.)* 300; *Middlesex Canal v. McGregor*, 3 *Mass.* 124.

100. Statement must Contain.—Where, upon motion to set aside the verdict as against law and evidence, all the evidence must be set forth, (*Wadsworth v. Harrison*, 14 *Iowa*, 272.) As against insufficiency of evidence, the whole case must be presented in the record. (*Barker v. Brown*, 15 *Id.* 70.) Where a statement on motion for a new trial fails to specify wherein the evidence is insufficient to justify the decision, such insufficiency as a ground of the motion will be disregarded. (*Sanchez v. McMahon*, 35 *Cal.* 218; *Pralus v. Pacific G. and S. Min. Co.*, 35 *Cal.* 30.) A specification that the evidence did not warrant or justify the judgment is insufficient. (*People v. Parrott*, *Cal. Sup. Ct., Jan. T.*, 1868.) It must specify the particulars in which the evidence is alleged to be insufficient. (*Love v. Sierra Nevada Lake Water and Min. Co.*, 32 *Cal.* 639.) And if the objection to the verdict is against the weight of evidence, must set forth all the testimony. *Dawley v. Hovious*, 23 *Cal.* 103.

101. Statement must Contain.—Where the statement on motion for a new trial did not contain that part of the evidence upon the sufficiency of which the truth of implied findings of fact depended, but showed merely that the moving party at the trial, "introduced evidence tending to prove" a state of facts adverse to those thus impliedly found, and the express findings were clearly sustained by the evidence set out in the statement: *Held*, that the statement was insufficient to show the moving party entitled to a new trial, because it did not appear

that said evidence which "tended to prove" amounted in fact to *proof* of said state of facts. (*Morrill v. Chapman*, 35 *Cal.* 85.) If the moving party, on motion for new trial, intends to rely on the point that a finding of fact is contrary to the evidence, he should specify in his statement wherein such finding is not justified by the evidence. It is not sufficient for him to state generally that the evidence is insufficient to justify the findings. *Beans v. Emanuelli*, 36 *Cal.* 117.

102. Weight of Evidence.—In some extraordinary cases where the verdict of a jury is clearly against the weight of evidence, a new trial will be awarded. (*Bagley v. Eaton*, 8 *Cal.* 159; *Hill v. Smith*, 32 *Cal.* 166; *Hart v. Leavenworth*, 11 *Mo.* 629; see, *per contra*, *Wilson v. Burks*, 8 *Id.* 446; *Dobsen v. Arnold*, 10 *How. Pr.* 528; *Stettiner v. Granite Ins. Co.*, 5 *Duer*, 594; *Wheeler v. Calkins*, 17 *How. Pr.* 451; *Fry v. Bennett*, 9 *Abb. Pr.* 45; *Heritage v. Hall*, 33 *Barb.* 347; *Smith v. Tiffany*, 36 *Barb.* 23; *Howsee v. Hammond*, 39 *Barb.* 96; *Adsit v. Wilson*, 7 *How. Pr.* 64; *Matthews v. Poultrely*, 33 *Barb.* 127; *Lewis v. Blake*, 10 *Bosw.* 198; *Rowe v. Smith*, *Id.* 268; *Ammons v. State*, 9 *Fla.* 530; *Coddington v. Carnley*, 2 *Hill.* 528; *State v. Elliott*, 15 *Iowa*, 72; *Brockman v. Berryhill*, 16 *Id.* 183; *Browne v. Jefferson*, *Id.* 339; *Edmiston v. Garrison*, 18 *Wis.* 594; *Gaines v. Forcheimer*, 9 *Florida*, 265; *Slocum v. Lurty*, *Hempst.* 431; *Zantzinger v. Weightman*, 2 *Cranch C. Cl.* 478; *Wilson v. James*, 3 *Blatchf.* 227.) But the Supreme Court will not interfere with the verdict of a jury on the ground that it is against the weight of evidence, except in extraordinary cases. (See *Treat v. Reilly*, 35 *Cal.* 129; *Kimble v. Gearheart*, 12 *Cal.* 27; 10 *Id.* 446; 14 *Id.* 167; *Johnson v. Pendleton*, 1 *Id.* 133; *Scannell v. Strahle*, 9 *Id.* 177; *Weddle v. Stark*, 10 *Id.* 301; *Bensley v. Atwill*, 12 *Id.* 240; *Ritter v. Stock*, 12 *Id.* 402; *McGarrity v. Byington*, 12 *Id.* 432; *Visher v. Webster*, 13 *Id.* 60; *Stevens v. Irwin*, 15 *Id.* 504; *Adams v. Pugh*, 7 *Id.* 150; *Ritchie v. Bradshaw*, 5 *Id.* 228; *Knowles v. Joost*, 13 *Id.* 620; *Brown v. Smith*, 10 *Id.* 508; *Gagliardo v. Hoberlin*, 18 *Id.* 394; *Lewis v. Cavillaud*, 21 *Id.* 178; *Oullahan v. Starbuck*, 21 *Id.* 413; *Tebbs v. Weatherwax*, 23 *Id.* 58; *Preston v. Keys*, 23 *Id.* 193; *Lubeck v. Bullock*, 24 *Id.* 338; *Ellis v. Jeans*, 26 *Id.* 275; *Wilcoxson v. Burton*, 27 *Cal.* 232; *Wilkinson v. Parrott*, 32 *Id.* 102; *Newell v. Rusk*, 23 *Ind.* 210; *Patton v. Patton*, 5 *J. J. Marsh.* 389; *United States v. Duval*, *Gulp.* 356.

103. Weight of Evidence.—To justify the Court in setting aside the verdict as against the weight of evidence, the Court should be

brought to the irresistible conclusion that the verdict was not the free, sound, and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result. (*McKay v. Thorington*, 15 *Iowa*, 25.) Where there is a contradiction between the testimony given by the parties themselves, a new trial should be granted. (*Hartman v. Proudfit*, 6 *Bosw.* 191; *Boyd v. Colt*, 20 *How. Pr.* 384; compare *Allen v. McCrasson*, 32 *Barb.* 662.) If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted for insufficiency of evidence to sustain the verdict. (*Kile v. Tubbs*, 32 *Cal.* 333; *Peterie v. Bugbey*, 24 *Cal.* 419; *Rice v. Cunningham*, 29 *Cal.* 492.) Cases where new trial was granted on this ground: (*Clemens v. Leveill*, 4 *Mo.* 80; *Scott v. Brockway*, 7 *Mo.* 61; *Bybee v. Kinote*, 6 *Mo.* 53.) But where there was evidence on both sides, it must clearly appear that the verdict was given by mistake, or any wilful abuse of power. (*Carr v. Gale*, 3 *Woodb. & M.* 38; *Fearing v. De Wolf*, *Id.* 185; *Macy v. De Wolf*, *Id.* 193; *Aiken v. Bemis*, *Id.* 348; *Whetmore v. Murdock*, *Id.* 380; *Davison v. Sealskins*, 2 *Paine*, 324; *Stanley v. Whipple*, 2 *McLean*, 35; to nearly the same effect, *Blanchard's Gun Stock Turning Factory v. Jacobs*, 2 *Blatchf.* 69; *Baker v. The "Potomac"*, 18 *How. Pr.* 185; *Shaw v. Collier*, *Id.* 238; *Walker v. Smith*, 1 *Wash. C. Ct.* 202; *Forman v. Miller*, 5 *McLean*, 218; *Williams v. Miller*, 1 *Wash. T.* 105.) But it should not go beyond that point to interfere with decision of fact fairly deducible from conflicting testimony. (*Mathews v. Poultney*, 33 *Barb.* 127; *Smith v. Tiffany*, 36 *Barb.* 23; *Gaines v. Forcheimer*, 9 *Florida*, 265.) In such case the verdict of a jury is decisive. (*Conklin v. Thompson*, 29 *Barb.* 218; *Heritage v. Hall*, 33 *Id.* 347; *Best v. Starks*, 24 *How. Pr.* 58; *Sheldon v. Hudson Riv. R.R. Co.*, 29 *Barb.* 226; *Fry v. Bennett*, 9 *Abb. Pr.* 45; *Williams v. Vanderbilt*, 29 *Barb.* 491.) As in questions of fraud. (1 *Gra. & Wat. on New Trial*, 353; 10 *Johns.* 101; 3 *Id.* 180; *People v. Townsend*, 37 *Barb.* 520.) Questions of title to chattels. (*Gardner v. Ryerson*, 19 *How. Pr.* 108.) Or the genuineness of a signature. (*Wright v. Carillo*, 22 *Cal.* 595.) Or a question turning on the credibility of a witness. *United States v. Five Cases of Cloth*, 2 *N.Y. Leg. Obs.* 84.

III. MOTION.

104. Under our system, from the entry of the verdict or filing of the findings of the Court, the motion for new trial is a kind of episode, or in a certain sense a collateral proceeding, a proceeding not in the direct line of the judgment, for the judgment may be at once entered and even executed, while the motion for new trial ends in an order reviewable on an independent appeal. (*Spanagle v. Dellinger*, *Cal. Sup. Ct.*, *Jul. T.*, 1869; *Benedict v. Caffee*, 3 *Duer*, 669; 12 *N.Y. Leg. Obs.* 262.) The motion for a new trial must be made promptly, but especially if based upon the ground of surprise. *Peck v. Hiler*, 30 *Barb.* 655; *Rapelye v. Prince*, 4 *Hill*, 119; *Snowhill v. Knapp*, 7 *N.Y. Leg. Obs.* 15.

105. If a motion for a new trial is not prosecuted with due diligence, it should be dismissed on application. (*Frank v. Doane*, and *Green v. Doane*, 15 *Cal.* 302; *Eckstein v. Calderwood*, 27 *Cal.* 413; see *Warden v. Mendocino Co.*, 32 *Id.* 655; *Ward v. Patterson*, 46 *Penn.* 372.) As a failure to prosecute is an abandonment of the motion. (*Mahoney v. Wilson*, 15 *Cal.* 42.) In Missouri, it must be prosecuted within four days after the trial. (*R.S.* 1835, 469, § 1; *Williams v. St. Louis C. Ct.*, 5 *Mo.* 248; *Allen v. Brown*, 5 *Id.* 323.) And where it does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict. (*Myers v. Casey*, 14 *Cal.* 542.) If the Judge who tried a cause goes to the county in his district not adjoining the one in which the

case was tried, to hold court, before the time for filing amendments to the statement on motion for a new trial has expired, the moving party prosecutes the motion with due diligence if he brings the same to a hearing when the Judge returns, or first holds court in a county adjoining the one in which the case was tried. *Warden v. Mendocino Co.*, 32 *Cal.* 655.

106. Argument on Motion.—On the argument, reference may also be made to the pleadings, depositions, and documentary evidence on file, and to the minutes of the Court. (*Cal. Pr. Act*, § 195; *Weatherby v. Carroll*, 33 *Cal.* 549.) Motion can only be heard on the record made and settled before the motion is made. (*Cosgrove v. Johnson*, 30 *Cal.* 509; *Quivey v. Gambert*, 32 *Cal.* 304.) After notice of intention, defendants may, at their option, move or not move for a new trial, and if they choose may abandon their proceedings. (*Stoyell v. Cole*, 19 *Cal.* 602.) But if the statement sets forth the grounds of the motion, and the motion is made and submitted, a refusal to argue the motion is not an abandonment of the same. *Carder v. Baxter*, 28 *Cal.* 99.

107. Denial of Motion.—An order dismissing a motion for a new trial is in effect denying a new trial. (*Warden v. Mendocino Co.*, 32 *Cal.* 655.) Where parties stipulate that a motion be denied, they cannot question the correctness of an order denying the same. (*Brotherton v. Hart*, 11 *Cal.* 405.) It is error to refuse a new trial when justice requires it. (*Ross v. Austill*, 2 *Cal.* 183.) No "exception" lies to overruling a motion for a new trial, nor for entering judgment. *Pomroy v. State Bank*, 1 *Wall. U.S.* 592.

108. Effect of Motion.—A motion for a new trial, filed within the time allowed by law, stays the operation of the judgment, and is not affected by the adjournment of the Court for the term. (*Lurvey v. Wells, Fargo & Co.*, 4 *Cal.* 106.) But a motion for a new trial does not stay the execution. (*People ex rel. Carpentier v. Loucks*, 28 *Cal.* 68.) Nor does it operate as a suspension of an injunction. (*Ortman v. Dixon*, 9 *Cal.* 23.) It, however, preserves all rights till it can be heard and determined. (*Lurvey v. Wells*, 4 *Cal.* 106.) If, after court has filed its findings of facts, the case is sent to a referee to take an account, the

motion does not stay the proceedings pending before the referee. (*Crowther v. Rowlandson*, 27 *Cal.* 376.) Nor does it stay proceedings on the judgment. (*People v. Loucks*, 28 *Cal.* 68.) Nor does the pendency of a motion for new trial stay proceedings so as to deprive the Court of the power of vacating an order appointing a receiver made before the trial. (*Copper Hill Min. Co. v. Spencer* (No. 1), 25 *Cal.* 11.) As to effect of motion for a new trial in particular cases, see the following: (*United States v. Hodge*, 6 *How. U.S.* 279; *Clark v. Manuf. Ins. Co.*, 2 *Woodb. & M.* 472; *Brent v. Coyle*, 2 *Cranch C. Ct.* 348; *Fraser v. Waller*, 6 *McLean*, 11; *Clark v. Sohler*, 1 *Woodb. & M.* 368.) That motion is not "equivalent to a new action," *States v. Hawkins*, 10 *Pet. U.S.* 125.

109. Hearing on Motion.—The fact that instructions given by the Court are lost or mislaid before a motion for a new trial is heard, is no ground to suspend the hearing of the motion. (*Visher v. Webster*, 13 *Cal.* 58.) It is irregular for the Court to reverse its first judgment, and render a contrary one, without hearing or notice. (*Mitchell v. Hackett*, 14 *Cal.* 661.) It has been held, that under the practice in U.S. courts, a party moving on affidavits cannot put in new evidence to rebut affidavits offered by the other party. (*Ames v. Howard*, 1 *Sumn. U.S.* 482.) Where bill of exceptions is taken at the trial, it must be waived, or a motion for a new trial will not be entertained. (*Cunningham v. Bell*, 5 *Mas. U.S.* 161.) Bill of exceptions rendered as a substitute for a case on motion for new trial. *Brewster v. Gelston*, 1 *Paine U.S.* 426.

110. Motion, when Made.—In proceedings on motion for a new trial, there is no term. (*Spangel v. Dellinger*, 34 *Cal.* 476.) The motion may be made before or after entry of judgment, and may be made at the term or out of the term. (*Id.*; but consult *Robb v. Robb*, 6 *Cal.* 21; *Baldwin v. Kraemer*, 2 *Id.* 582; *Wilson v. McEvoy*, 25 *Cal.* 169; *Hegeler v. Henckel*, 27 *Cal.* 491.) It should be made at the earliest period practicable after filing the affidavits and statement; (*Cal. Pr. Act*, § 196; *Nevada*, § 196; *Arizona*, § 198; *Idaho*, § 199;) and be made during the term, unless for good cause the Court grant further time. (*Laws of Oregon*, § 233; *Wash. T.* § 245.) A motion for a new trial should not be made while proceedings are pending before a referee. (*Crowther v. Rowlandson*, 27 *Cal.* 376.) A stipulation to refer the whole matter is a waiver of any objection that the motion was not made in statute time. (*Heslep v. San Francisco*, 4 *Cal.*

2.) In New York, it seems the application for new trial must be made at the term at which the trial took place. (*N.Y. Code*, §§ 264, 265.) So in Missouri. (See *Honey v. Honey*, 18 *Mo.* 466.) And in New York, it seems it must be made before the entry of judgment. *Sheldon v. Stryker*, 42 *Barb.* 284; *Jackson v. Fassitt*, 33 *Barb.* 645; 12 *Abb. Pr.* 281; 9 *Abb. Pr.* 137; *Case v. Shepherd*, 1 *Johns. Cas.* 245; *Gurnee v. Smithson*, 7 *Bosw.* 396; *Jackson v. Chace*, 15 *Johns.* 354; *Anderson v. Dickie*, 17 *Abb. Pr.* 83; 26 *How. Pr.* 199; *Hastings v. McKinley*, 3 *Code R.* 10; *Barnes v. Roberts*, 5 *Bosw.* 73; see, however, *contra*; *Tucker v. White*, 27 *How. Pr.* 97.

111. Motion, when Made.—It seems, in New York, it is too late to move for a new trial after judgment entered. (7 *Cow.* 106; 15 *Johns.* 354; 4 *Hill*, 125; *Peck v. Hiler*, 30 *Barb.* 655; *Gurney v. Smithson*, 7 *Bosw.* 396; *Anthony v. Smith*, 4 *Bosw.* 503; *Jackson v. Fassitt*, 33 *Barb.* 645; 12 *Abb. Pr.* 281; 21 *How. Pr.* 279; *Barnes v. Roberts*, 5 *Bosw.* 73.) After judgment is entered, the only remedy is by appeal. (*Ball v. Syracuse and Utica R.R. Co.*, 6 *How. Pr.* 198; *Jackson v. Fassitt*, 17 *How. Pr.* 453; 9 *Abb. Pr.* 137.) Unless judgment is entered as security. (*Benedict v. Caffé*, 3 *Duer*, 669; 12 *N.Y. Leg. Obs.* 262.) It was held in Indiana, under their practice, application for a new trial, on the ground of causes discovered after the term, must clearly show that such causes were not discovered till after the term. (*Tillson v. Crim*, 22 *Ind.* 357.) And must be made upon the same ground as an application would be based during the term. (*Glide-well v. Daggy*, 21 *Ind.* 95; *Pattison v. Wilson*, 22 *Ind.* 358.) In Arkansas, it is in the discretion of the Court to receive a motion for a new trial, although filed after the prescribed time. *Gould v. Tatum*, 21 *Ark.* 329.

112. Pendency of Motion.—And if motion be taken under advisement, the Court may, in term time or vacation, order judgment on a verdict rendered and recorded. (*Hutchinson v. Bours*, 13 *Cal.* 50.) But if pending a motion for a new trial taken under advisement for decision in vacation, and a new term intervenes, it is a continuance of the motion, and the Court may act on it at its convenience. (*Hutchinson v. Bours*, 13 *Cal.* 50; *Sheppard v. Wilson*, 6 *How. U.S.* 260.) But a court has no power to enter an order *nunc pro tunc* made at the adjourned term, where there is nothing in the record to show that such order was made. (*Hegeler v. Henckell*, 27 *Cal.* 491.) If no motion is made for a new trial in the court below, the findings of the Court

and the verdict of the jury are conclusive of the facts. (*Allen v. Fennon*, 27 *Cal.* 68.) The provisions of the Practice Act in relation to motion for new trials have no application to a motion to set aside the report of the commissioners in a proceeding to condemn lands for railroad purposes; and such motion may be properly founded on the report itself, of which the testimony taken by the commissioners properly forms a part. (*W. P. R.R. Co. v. Reed*, 35 *Cal.* 621.) The award in such cases will not be set aside when there is a substantial conflict in the testimony. *Id.*

113. Parties to Motion.—One of several parties against whom a judgment is rendered, who does not join in the motion for a new trial, cannot complain of alleged error in denying a new trial. *Calderwood v. Brooks*, 28 *Cal.* 151.

PART ELEVENTH.

APPEALS.

CHAPTER I.

APPEALS TO THE SUPREME COURT OF THE UNITED STATES.

1. The right of appeal to the United States Supreme Court, from the Supreme Court of California, is limited by Section twenty-five of the Act of Congress of 1789, commonly called the Judiciary Act. (*Ferris v. Coover*, 11 *Cal.* 175; *Wiscart v. Dauchy*, 3 *Dall. U.S.* 321; *United States v. Moore*, 3 *Cranch U.S.* 159; *Ray v. Law*, *Id.* 179; *Durousseau v. United States*, 6 *Id.* 307; *Jennings v. The "Perseverance,"* 3 *Dall. U.S.* 336.) Where no appeal is allowed by law, the proper method to take a case to an appellate court is by writ of error. *Middleton v. Gould*, 5 *Cal.* 190; *Haight v. Gay*, 8 *Id.* 297.

2. An appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact as well as the law to a review and revisal; but a writ of error is of common law origin, and removes nothing for re-examination but the law. *Wiscart v. Dauchy*, 3 *Dall. U.S.*

321; compare *The "San Pedro,"* 2 *Wheat. U.S.* 132; *United States v. Wouson,* 1 *Gall. U.S.* 512; *United States v. Goodwin,* 7 *Cranch U.S.* 108.

3. When a final judgment in a suit has been rendered in the highest court of law or equity of a State in which a decision in the suit could be had, and a writ of error has been issued by the Clerk of the Circuit Court of the United States, directed to the judges of the court in which the judgment was rendered, commanding that the record be sent before the Supreme Court of the United States to be there reviewed, the presiding Judge of the Court in which the judgment was rendered is not compelled, as a matter of right, to award a citation to the respondent to appear before the Supreme Court of the United States to maintain the validity of his judgment, but he may look into the record for the purpose of determining whether in his opinion the judgment is one from which a writ of error lies, and if he determines that it is not, he may refuse the citation. *Greely v. Townsend,* 25 *Cal.* 608.

4. The Judge of the United States District Court for the District of Oregon has no authority, while holding the Circuit Court of the United States for the District of California, to sign a citation upon a writ of error from the Supreme Court of the United States to the Supreme Court of this State; nor has he authority to take and approve of the security required in order to make the writ of error a *supersedeas*, and operate as a stay of execution upon the judgment to be reviewed. *Tompkins v. Mahoney,* 32 *Cal.* 231.

WHEN WRIT OF ERROR LIES.

5. The true test as to whether a writ of error lies to the Supreme Court of the United States, from the final judgment of a State court, is to be arrived at, not from mere averment in the pleadings, but from the matter decided, as developed in the whole record. (*Greely v. Townsend*, 25 *Cal.* 614.) When writ of error lies, consult (*Magraw v. McGlynn*, 32 *Cal.* 257; *Athearn v. Poppe*, and *Bours v. Walsh*, 25 *Cal.* 632; *Greeley v. Townsend*, 25 *Id.* 608; *Puget Sound Agricultural Co. v. Pierce Co.*, *Wash. Terr.* 90.) That judgment of law must be removed by writ of error, see *Bevins v. Ramsey*, 11 *How. U.S.* 185; *Verden v. Coleman*, 22 *Id.* 192; *Lytle v. Arkansas*, *Id.* 193.

JURISDICTION.

6. The Supreme Court of the United States has no jurisdiction of a case brought up upon an agreed statement of facts, without writ of error or appeal. (*Washington Co. v. Durant*, 7 *Wall. U.S.* 694; *Denhurst v. Coulthard*, 3 *Dall. U.S.* 409.) And the appeal on writ of error must be prosecuted at the next succeeding term. (*Castro v. United States*, 3 *Wall. U.S.* 46.) It has no jurisdiction of an appeal, unless the transcript of the record is filed at the next term after the appeal is obtained, though the transcript is filed at the next term after the appeal bond is given, and though the citation recites that the appeal was allowed at the term at which the appeal bond is given. *Id.*; *Edmondson v. Bloomshire*, 7 *Wall. U.S.* 306.

WHEN APPEAL LIES.

7. Appeals from the United States district courts of California to the Supreme Court of the United States are subject to the general regulations of the Judiciary Acts of 1789 and 1803, as construed by the Supreme Court of the United States. (*Castro v. United States*, 3 *Wall. U.S.* 46.) A decree of the United States Circuit Court or District Court, in a case for the ascertainment and settlement of private land claims in the State of California, is in the nature of a proceeding in equity, and is subject to appeal to the Supreme Court of the United States. *United States v. Circuit Judges*, 3 *Wall. U.S.* 673.

8. Appeals from decrees, in cases of California surveys, in the name of the United States, under the Act of 1860, commonly called the Survey Act, are discouraged as being liable to abuse. (*United States v. Billing*, 2 *Wall. U.S.* 444.) Appeals may be taken to the United States circuit courts from the final judgments or decrees of the United States district courts, in cases of admiralty and maritime jurisdiction, where the amount in controversy, exclusive of costs, exceeds fifty dollars. (See *Warner v. "Uncle Sam,"* 9 *Cal.* 697; *United States v. Haynes*, 2 *McLean*, 155; *Westcot v. Bradford*, 4 *Wash. C. Ct.* 492; *United States v. Wonson*, 1 *Gall. U.S.* 5; *Jenks v. Lewis*, 3 *Mas. U.S.* 503; *Shirley v. Titus*, 1 *Sumn. U.S.* 447.) As to the mode of proceeding in such cases, see *Sloop "Leonede" v. United States*, *Wash. Terr.* 174; *Brewster v. Wakefield*, 22 *How. U.S.* 107; *Reddall v. Bryan*, 24 *Id.* 420; *Exp.*

Dubuque and Pacific Railroad Company, 1 *Wall. U.S.* 69.

AMOUNT IN CONTROVERSY.

9. The amount is regulated by the matter in dispute in the original controversy. (*Wilson v. Daniel*, 3 *Dall.* 401.) Matter in dispute, as regulated by appellants claim, see (*Shirley v. Titus*, 1 *Sumn.* 447; *Jenks v. Lewis*, 3 *Mas.* 503; *Westcott v. Bradford*, 4 *Wash. C. Ct.* 492; *United States v. Haynes*, 2 *McLean*, 155; *Lee v. Watson*, 1 *Wall. U.S.* 337.) In cases of a set off, (*Ryan v. Bendly*, 1 *Id.* 66.) The distinction between an appeal taken by plaintiff and an appeal taken by defendant, as fixing the amount in controversy, *Gordon v. Ogden*, 3 *Pet. U.S.* 33; *Smith v. Hovey*, 3 *Id.* 469; *Knapp v. Banks*, 2 *How. U.S.* 73; *Grant v. McKee*, 1 *Pet. U.S.* 248; *Scott v. Lunt*, *Id.* 349.

10. Interest cannot be included to make up the demand sufficient to give jurisdiction, unless claimed in the original pleadings. (*Udall v. The "Ohio,"* 17 *How. U.S.* 17.) Where the decree was subsequently reduced, and the amount in controversy was sufficient to give jurisdiction, such reduction cannot deprive the Court of jurisdiction. (*Cook v. United States*, 2 *Wall. U.S.* 218.) Amount of judgment is not material on review of decision in the state courts, against rights claimed under the laws and treaties of the United States. (*Buel v. Van Ness*, 8 *Wheat.* 312.) As in actions under the Revenue Laws. *United States v. Bromley*, 12 *How. U.S.* 88.

11. **Bond.**—In an action on a bond for the matter in dispute, the Court will look to the sum alleged by the obligee to be due upon the

condition of the bond, and not to the penalty. (*United States v. McDowell*, 4 *Cranch*, 316.) But where the declaration contained no breach, and the penalty is sufficient, jurisdiction will lie. *Postmaster-General v. Cross*, 4 *Wash. C. Ct.* 326.

12. Ejectment.—In an action of ejectment, the matter in dispute must be governed by the value of the particular lot in question, and cannot be governed by the value of the entire tract. *Grant v. McKee*, 1 *Pet. U.S.* 248.

13. Injunction.—In injunction, the jurisdiction does not depend upon the amount of any contingent loss or damage which may be sustained, but upon the amount in dispute. *Ross v. Prentice*, 3 *How. U.S.* 771.

14. Specific Performance.—Jurisdiction is governed by the matter in controversy. (*Brown v. Shannon*, 20 *How. U.S.* 55.) The amount for which it was admitted by the parties that the contract had recently been sold and assigned. *Id.*

15. Replevin.—The value of the article replevied is the measure of the matter in dispute. *Peyton v. Robertson*, 9 *Wheat.* 527.

16. Salvage.—The matter in dispute must be measured by each several claim, as each is considered as a separate appeal, although the libel is joint against the whole property. *Stratton v. Jarvis*, 8 *Pet. U.S.* 4.

17. Seizure.—The value in controversy is the value of the property at the time of the seizure, exclusive of the duties. *United States v. Eighty-four boxes of Sugar*, 7 *Pet. U.S.* 453.

18. Trover.—If the judgment below be in favor of defendant, the sum claimed as damages in the declaration is the matter in dispute. *Cooke v. Woodrow*, 5 *Cranch*, 13.

CHAPTER II.

APPEALS FROM THE DISTRICT COURTS TO THE SUPREME COURT.

19. Appeals may be taken from the district courts to the Supreme Court. From a final judgment: *First*, In an action or special proceeding commenced in those courts; *Second*, In an action or special proceeding brought into those courts from other courts. Or, from an order. *First*, An order granting or refusing a new trial; *Second*, An order granting or dissolving an injunction; *Third*, An order dissolving or refusing to dissolve an attachment; *Fourth*, Any special order made after final judgment; *Fifth*, And from such interlocutory judgments, in actions for partition, as determine the rights and interests of the respective parties, and direct partition to be made. *Cal. Pr. Act*, § 347; *Solomon v. Reese*, 34 *Cal.* 28; *Doherty v. Thayer*, 31 *Id.* 141.

AMOUNT IN CONTROVERSY.

20. The amount in dispute, and not the value of the property seized, determines the jurisdiction of the Supreme Court. (*Bruneau v. Houghton*, 15 *La. An.* 47; *Skillman v. Lachman*, 23 *Cal.* 198.) The interest due on the claim should be included in estimating the amount in dispute. (*Malson v. Vaughn*, 23 *Cal.* 61; *Skillman v. Lachman*, *Id.* 198.) The fact that judgment has been rendered in the District Court for a sum less

than three hundred dollars does not oust the appellate jurisdiction of the Supreme Court, provided the sum *sued for in the complaint amounts to three hundred dollars*. *Solomon v. Reese*, 34 *Cal.* 28.

21. Where plaintiff appeals from a judgment for defendant, the jurisdiction is determined by the amount claimed in the complaint. (*Skillman v. Lachman*, 23 *Cal.* 198; *Le Blanc v. Pettman*, 16 *La. An.* 430). If from a judgment in his own favor, the amount in dispute is the difference between the amount of the judgment and the sum claimed by the complaint. *Skillman v. Lachman*, 23 *Cal.* 198.

APPEALABLE JUDGMENTS.

22. A judgment, to admit of appeal, must be final. (*Lyman v. Alexander*, 9 *Flor.* 489; *Watson v. Savell*, *Id.* 506.) Or an interlocutory judgment which will work irreparable injury to the appellant. (*North v. Leathers*, 17 *La. An.* 97; *Pierce v. New Orleans*, 16 *La. An.* 395.) A judgment, to be final, must give relief by its own force, or be enforceable for that purpose without further action by the Court. (*Bondurant v. Apperson*, 4 *Met. (Ky.)* 30.) When an order for judgment has been made and regularly entered by the Clerk, and judgment has been drawn up, signed by the Judge and filed with the Clerk, final judgment has been rendered. *Gray v. Palmer*, 28 *Cal.* 416.

23. The judgment of the Supreme Court upon appeal and the costs thereon is final. (*Marysville v. Buchanan*, 3 *Cal.* 212; *Hough v. Kelsey*, 19 *Md.* 451.) So, a judgment reversing the judgment of an inferior

court, and remanding the same, is final. (*Rankin v. Perry*, 5 *Mo.* 501; *Perry v. Alford*, 5 *Id.* 503.) Or affirming. (*Mulford v. Estudillo*, 32 *Cal.* 131.) But not on an incidental matter collateral to the suit. (*George v. Craig*, 6 *Mo.* 648.) A judgment refusing a writ of prohibition is a final judgment. *Weston v. City Council of Charleston*, 2 *Pet. U.S.* 449.

24. A judgment by default is a final judgment; there is no distinction between judgments by default or those after issue joined and a trial. (*Stevens v. Ross*, 1 *Cal.* 94; *Burt v. Scranton*, *Id.* 416; *Ricketson v. Compton*, 23 *Cal.* 536; *People v. Woodlief*, 2 *Cal.* 241; *Halleck v. Jaudin*, 34 *Cal.* 167; *Porter v. Herman*, 8 *Id.* 619; *Holman v. Sigourney*, 11 *Met.* 436; *Joyce v. Joyce*, 5 *Id.* 449; *Ball v. Burke*, 11 *Cush.* 80; *Henderson v. Gibson*, 19 *Md.* 234.) In insolvent cases. (*People v. Rosborough*, 29 *Cal.* 415.) In a contested election case. (*Dorsey v. Barry*, 24 *Cal.* 449; *Day v. Jones*, 31 *Id.* 261.) In partition. (*Laws of Cal.* 1864, p. 223; *Peck v. Vandenberg*, 30 *Cal.* 11; *Durham v. Durham*, 34 *Mo.* 447.) On an award. *Muldrow v. Norris*, 2 *Cal.* 74.

25. In New York the practice differs, and an appeal does not lie from a judgment by default. (12 *Johns.* 493; *Dick.* 287; 2 *Sch. and L.* 712; *Henry v. Cuyler*, 17 *Johns.* 469; *Colden v. Knickerbacker*, 2 *Cow.* 31; *Campbell v. Stakes*, 2 *Wend.* 137; *Wood v. Young*, 5 *Id.* 620; *Kane v. Whittick*, 8 *Id.* 219; *Dorr v. Birge*, 8 *Barb.* 351; *Travis v. Waters*, 12 *Johns.* 500; *Gelston v. Hoyt*, 13 *Johns.* 551; *Adams v. Oaks*, 20 *Johns.* 282; *Jones v. Kip*, 7 *N.Y. Leg. Obs.* 91; *Pope v. Dinsmore*, 8 *Abb. Pr.* 429; *Irving Bank v.*

Palmer, *Gen. T.*, 1st Dist. Mar. 1864; Dutch Church v. Wood, 8 *Barb.* 421; Wilkinson v. Tiffany, 4 *Abb. Pr.* 98.) So, in Nevada, an appeal will not lie from a judgment by default. (Paul v. Armstrong, 1 *Nev.* 82.) Unless irregularly and erroneously entered. Kidd v. Four Twenty, 3 *Nev.* 381.

26. Case Stated.—An appeal lies from a judgment upon an agreed statement of facts, on an *audita querela*. (Hovey v. Crane, 10 *Pick.* 440; Parker v. Framingham, 8 *Met.* 260; Furlong v. Leary, 8 *Cush.* 409; White v. Clapp, 8 *Allen (Mass.)* 283.) From judgment on a case submitted in writing for trial, without the intervention of a jury, if no exceptions are taken, no appeal lies. Bass v. Haverhill Ins. Co., 10 *Gray (Mass.)* 400.

27. Consent.—A judgment or order entered by consent is not appealable. (Meerholz v. Sessions, 9 *Cal.* 277; approved in Brother-ton v. Hart, 11 *Cal.* 405; Mills v. Brown, 16 *Pet.* 525; Sampson v. Welch, 24 *How. U.S.* 207; Lambert v. Moore, 1 *Nev.* 231; Boyd v. Bigelow, 14 *How. Pr.* 511; Viele v. Troy and Bost. R.R., 21 *Barb.* 381; Van Wormer v. Mayor of Albany, 18 *Wend.* 169; O'Dougherty v. Aldrich, 5 *Denio*, 385; Toder v. Sansam, 1 *Bro. P. C.* 468.) Not even under a stipulation to that effect. Kelsey v. Forsyth, 21 *How. U.S.* 85; Jarvis v. Palmer, 1 *Barb. Ch.* 379; Perkins v. Farnham, 10 *How. Pr.* 120.

28. Costs.—A judgment for plaintiff, for costs only, may be appealed from. (Meeker v. Harris, 23 *Cal.* 285; McDaniels v. Johnson, 36 *Vt.* 687; McGregor v. Comstock, 19 *N.F.* 581; Decker v. Gardiner, 8 *N.F.* 29; Lord Advocate v. Dunglas, 9 *Clark & Fin.* 173.) Cases in which it is said no appeal will lie upon a mere question of costs, as being in the discretion of the Court: (Sherman v. Daggett, 3 *How. Pr.* 426; Rogers v. Holly, 18 *Wend.* 350; Eastburn v. Kirk, 2 *Johns. Ch.* 317; Travis v. Waters, 12 *Johns.* 500.) It seems that, in New York, an appeal will not lie merely for costs. (Eastburn v. Kirk, 2 *Johns. Ch.* 317; Travis v. Waters, 12 *Johns.* 500.) So in Texas. (McAlpin v. Bennet, 21 *Tex.* 535.) So in Indiana. (Walmer v. Schulemberger, 23 *Ind.* 454.) In Massachusetts, if the Court of common pleas disallowed the defendant's motion for costs upon a discontinuance of a suit, an appeal would lie. (Gilbreth v. Brown, 15

Mass. 178.) Where judgment was rendered for defendant for costs, "but no final determination of the rights of the parties in the action," it is not a final judgment, and no appeal will lie. *Smarr v. McMaster*, 34 *Mis.* 204; *Fowler v. Bashore*, *Id.* 245; *Higbee v. Bowers*, 9 *Mo.* 350.

29. Nonsuit.—But an appeal will not lie from a judgment after a new trial has been granted. (*Kower v. Gluck*, 33 *Cal.* 401.) Or from judgment of nonsuit entered on the motion of the party. (*Imley v. Beard*, 6 *Cal.* 666; *Sleeper v. Kelly*, 22 *Cal.* 456; *Van Wormer v. Mayor of Albany*, 18 *Wend.* 169; *O'Dougherty v. Aldrich*, 5 *Den.* 385.) In Massachusetts, an appeal lies from a judgment of nonsuit. *Holman v. Sigourney*, 11 *Met.* 436; *Ball v. Burke*, 11 *Cush.* 80.

30. Partition.—An appeal may be taken from such interlocutory judgment, in actions for partition, as determines the rights and interests of the respective parties, and directs partition to be made. (*Laws of Cal.* 1865-6, p. 707.) If the interlocutory judgment in partition adjudges that one of the parties has no interest in the property, it is not a final judgment as to him, from which he can appeal. (*Peck v. Vandenberg*, 30 *Cal.* 11.) From such interlocutory judgment, in action for partition, as determines the rights and interests of the respective parties, and directs partition to be made. (*Laws of Cal.* 1864, p. 223; *Cal. Pr. Act*, § 347; changing the practice as reported in *Gates v. Salmon*, 28 *Cal.* 320; see *Peck v. Vandenberg*, 30 *Cal.* 11.) But the Act of 1864 does not apply to judgments rendered before its passage. (*Peck v. Courtis*, 31 *Cal.* 207.) The Act of 1864, allowing an appeal in cases of partition, is not retroactive so as to apply to judgments already entered. (*Gates v. Salmon*, 28 *Cal.* 320.) In Massachusetts, the judgment accepting the report of commissioners, in a petition for partition, is not appealable. (*Pierce v. Oliver*, 13 *Mass.* 211; but see *Rev. Stat. of Mass.*, c. 103, § 19) In Missouri, a decree that partition be made between the parties is interlocutory, and no appeal will lie. *Gudgell v. Mead*, 8 *Mo.* 53; *McMurtry v. Glascock*, 20 *Id.* 432; *Stephens v. Hume*, 25 *Id.* 349.

31. Special Proceedings.—A judgment finding the amount due on a mortgage, and directing a sale of the mortgaged premises, may be appealed from. (*Swan's Pr. & Pl.* 238.) In proceeding to condemn land, the decision of the Court by which the merits of the matter are finally determined is a final judgment in a special proceed-

ing. (*Sacramento P. and N. R.R. Co. v. Harlan*, 24 *Cal.* 334; *San Francisco and San Jose R.R. Co. v. Mahoney*, 29 *Cal.* 112.) A judgment of the Supreme Court, compelling a board of Supervisors to execute and deliver to the Central Pacific R.R. Co. bonds of said City and County, as specified in the Act of April 22d, 1863, was a final judgment. *People v. Coon*, 25 *Cal.* 635.

32. Void Judgment.—An appeal may be taken from a void judgment. *Hastings v. Burning Moscow Co.*, 2 *Nev.* 93; *Gormly v. McIntosh*, 22 *Barb.* 271; *Commonwealth v. O'Neil*, 6 *Gray*, 343; compare *Malone v. Clark*, 2 *Hill*, 657; *Randall v. Hall*, *Hill & D. Supp.* 239; *Edwards v. Russell*, 21 *Wend.* 63; *Striker v. Mott*, 6 *Wend.* 465; *Lamoure v. Caryl*, 4 *Den.* 370; *Fairbanks v. Corlies*, 1 *Abb. Pr.* 150.

APPEALABLE DECREES.

33. To authorize an appeal, the decree must be final on all matters within the pleadings, so that the affirmance of the decree will end the suit. (6 *How. U.S.* 205, 209; *Craighead v. Wilson*, 18 *How. U.S.* 199.) A decree providing for the subsequent collection of money, sale of stock, and payment in accordance with the decree, is still a final decree. (*Neall v. Hill*, 16 *Cal.* 145.) A decree is final if it decides the ownership of the property in suit, and directs its immediate transfer, though accounts remain to be taken between the parties. *Thompson v. Dean*, 7 *Wall. U.S.* 342.

34. A decree adjudging that the defendant pay a certain sum into Court, or in default thereof that a receiver be appointed, is a final decree. (*Wabash and Erie Canal v. Beers*, 1 *Black. U.S.* 54; *Martin v. Blanchin*, 16 *La. An.* 83; *Heroy v. Gibson*, 10 *Bosw.* 591; *Bailey v. Lane*, 15 *Abb. Pr.* 373.) A decree of the District Court in admiralty, refusing to order the sale of a vessel as petitioned by one of two part owners,

is a final decree. (*Davis v. The "Seneca," Gilp. U.S. 34.*) The decrees in the District Court, on California land surveys, under the acts of Congress, are final. *United States v. Billing, 2 Wall. U.S. 444; Fossat v. Case, Id. 649.*

35. Divorce.—From a decree rendered in a suit for divorce an appeal lies. *Conant v. Conant, 10 Cal. 249.*

36. Foreclosure.—A decree for the foreclosure and sale of mortgaged premises is a final decree before the return and confirmation. (14 *How. U.S. 330; 13 Wend. 224; Whiting v. Bank of the U.S., 13 Pet. U.S. 6; Bronson v. Railroad Co., 2 Black. U.S. 524; Ray v. Law, 3 Cranch U.S. 179; but compare Orchard v. Hughes, 1 Wall. U.S. 73; Railroad Co. v. Soutter, 2 Wall. U.S. 440; Tripp v. Cook, 26 Wend. 143.*) An appeal will lie from a confirmation of a sale in a mortgage case. (*Hey v. Schooley, 7 Ohio, 48; Kern's Adm'r v. Foster, 16 Ohio, 274.*) A decree in a suit to enjoin trustees from selling, dissolving an injunction before granted, and ordering that they shall sell and bring the proceeds into Court to abide further orders, is a final decree, from which an appeal lies, within the meaning of the Act of 1803. *Railroad Co. v. Bradleys, 7 Wall. U.S. 575.*

NON-APPEALABLE DECREES.

37. In chancery, a decree is interlocutory whenever an inquiry as to matter of law or fact is directed preparatory to a final decision. (1 *Nev. 322.*) But when a decree finally decides and disposes of the whole merits of the cause, it is a final decree. (7 *Paige, 18; Beebe v. Russell, 19 How. U.S. 283.*) A decree ordering a reference and an accounting, and reserving all other matters in controversy, is not final. *Craighead v. Wilson, 18 How. U.S. 199; Perkins v. Tourniquet, 6 How. U.S. 203; Pulliam v. Christian, 6 How. U.S. 209; Crawford v. Points, 13 How. U.S. 11; Dows v. Congden, 28 N.Y. 122.*

38. A general decree, before the funds are collected, that they shall be distributed among certain parties, and appointing a master to state an account, is not a final decree. (*Ogilvie v. Knox Ins. Co.*, 2 *Black.* 539.) A decree of the Supreme Court, simply reversing the decree made by an inferior court, and remitting the cause for further proceedings, is not final. (10 *Wheat.* 502; 11 *Id.* 429; 7 *How. U.S.* 650; 13 *Id.* 11; 18 *Id.* 199; *Harvey v. Richards*, 2 *Gall. U.S.* 216; *Pepper v. Dunlap*, 5 *How. U.S.* 51; *Harwiston v. Stanthrop*, 2 *Wall. U.S.* 106; *Winn v. Jackson*, 12 *Wheat. U.S.* 135; *Corning v. Troy Iron and Nail Factory*, 15 *How. U.S.* 451; *Griffin v. Orman*, 9 *Fla.* 22; *Owens v. Love*, *Id.* 325.) Where restitution, with costs and damages, have not been assessed, the decree is not final. (The "Palmyra," 10 *Wheat.* 502; distinguishing *Ray v. Law*, 3 *Cranch, U.S.* 179; *Chase v. Vasquez*, 11 *Wheat.* 429.) A decree, that a sum of money is due, but leaving the amount dependant upon other claims, is not final. 19 *How. U.S.* 200; *Montgomery v. Anderson*, 21 *How. U.S.* 386.

39. A supplemental decree of sale is but a decree in execution of the original decree, and not final. (*Carr v. Hoxie*, 13 *Pet. U.S.* 460.) Nor is a subsequent decree of possession, to put buyer in possession of property sold. (*Callan v. May*, 2 *Black. U.S.* 541.) A decree dismissing a cross bill alone is not final. *Ayres v. Carver*, 17 *How. U.S.* 591.

APPEALABLE ORDERS.

40. Under the Act regulating appeals, passed the twenty-sixth of April, 1851, an appeal lies from every

order and decision of an inferior court which affects a substantial right. (*Burgoyne v. Holmes*, 3 *Cal.* 50; *McMahon v. Mut. Benefit Life Ins. Co.*, 12 *Abb. Pr.* 28; *Artisans' Bank v. Treadwell*, 34 *Barb.* 553; *The State v. Judge*, 16 *La. An.* 159.) Intermediate orders, involving the merits, are appealable. (*Koehler v. Ball*, 2 *Kansas*, 160; *Rapalee v. Stewart*, 27 *N.Y.* 310; *Sheldon v. Adams*, 41 *Barb.* 54; *Oatman v. Bond*, 15 *Wis.* 20; *Ballston Spa Bank v. Marine Bank*, 18 *Wis.* 604; *Conger v. Douglass*, 8 *Barb.* 81.) An order made by the Court, on a motion, is a final adjudication upon the subject matter, and may be appealed from. (*Kit-tredge v. Stevens*, 23 *Cal.* 283.) So, an order or judgment upon an award, when such order or judgment is founded upon matter of law apparent on the record. *Skeels v. Chickering*, 7 *Met.* 316; *Ward v. American Bank*, *Id.* 486.

41. Appeals lie in all cases from final decisions in courts of justices of the peace and county courts, the remedy by *certiorari* being concurrent. (*Blanchard v. Bennett*, 1 *Oregon*, 328.) Any judgment, order, or decree, which puts an end to the proceedings, may be appealed from. (*Hill v. Young*, 3 *Mo.* 337; *Ex parte McGrade*, 24 *Mo.* 125.) Or an order of the County Court dismissing an appeal. *Zoeler v. McDonald*, 23 *Cal.* 136.)

The following are orders involving a substantial right, and which are appealable in the States where the decisions were made.

42. **Amendment.**—An order authorizing the insertion in a complaint of an entirely different cause of action involves a substantial right, and is appealable. (*Sheldon v. Adams*, 41 *Barb.* 54; 27 *Barb.*

179; 18 *Abb. Pr.* 405.) In New York, an appeal will not lie from an order granting or refusing an amendment. (*N.Y. Ice Co. v. N.W. Ins. Co.*, 21 *How. Pr.* 296; *Bailey v. Johnson*, 1 *Daly*, 61; *Jones v. Derby*, 16 *N.Y.* 242; *Sackett's Harbor Bank v. Burwell*, 9 *How. Pr.* 95; *Russell v. Conn*, 20 *N.Y.* 81; *Hodges v. Tenn. Marine and Fire Ins. Co.*, 4 *Seld.* 416; *Audubon v. Excelsior Ins. Co.*, 27 *N.Y.* 216; *Bennard v. Spring*, 42 *Barb.* 470; *Thompson v. Kessel*, 30 *N.Y.* 383; *McCarty v. Edwards*, 24 *How. Pr.* 236; *Mitchell v. Van Buren*, 27 *N.Y.* 300; *Walsh v. Wash. Ins. Co.*, 32 *N.Y.* 427; *Van Duzer v. Howe*, 21 *N.Y.* 531; *Lounsbury v. Purdy*, 18 *N.Y.* 515.) Or imposing terms or granting an amendment. (*Schermerhorn v. Wood*, 30 *How. Pr.* 316; *Sheets v. Selden*, 7 *Wall. U.S.* 416.) Or modifying judgment after actual entry. *Butler v. Niles*, 28 *How. Pr.* 181; but see *Bryan v. Berry*, 8 *Cal.* 130.

43. Attachment.—From an order dissolving or refusing to dissolve an attachment, an appeal will now lie. (*Cal. Pr. Act*, §§ 336, 347; changing the practice as reported in *Alexander v. Fritts*, 24 *Cal.* 447; *Howell v. Kingsbury*, 15 *Wis.* 272.) A judgment giving priority to one creditor over another, as to attached funds of a debtor, but not distributing or giving any other relief to the parties, is not a final order. *Hanson v. Bowyer*, 4 *Met. (Ky.)* 108.

44. Bill of Particulars.—An order directing a bill of particulars, as regards extent to which they are to be furnished, is appealable. (*Mason v. Ring*, 10 *Bosw.* 598.) But refusal to allow service of such bill of particulars after time expired is discretionary, and not appealable. *Goings v. Patten*, 1 *Daly*, 168.

45. Contempt.—An order or judgment putting a party in contempt is appealable. *Ex parte Rowe*, 7 *Cal.* 175; *Ware v. Robinson*, 9 *Id.* 107; *Fremont v. Merced Co.*, 9 *Id.* 18; questioned in *People ex rel. Pease v. King*, 9 *How. Pr.* 97.

46. Decree, Setting Aside.—An appeal lies from an order setting aside a decree in equity, and granting a rehearing. (*Riddle v. Baker*, 13 *Cal.* 295; *Michigan Ins. Co. v. Whitmore*, 12 *Mich.* 311.) In Pennsylvania, an order founded on a previous decree to pay money cannot be appealed from. *Chew's Appeal*, 3 *Grant (Penn.)* 294.

47. Dismissal of Action.—An order dismissing an action after issue joined is appealable. (*Richards v. Allen*, 8 *Pick.* 405; *Piper*

v. Willard, 10 *Pick.* 34; *Hovey v. Crane*, 10 *Pick.* 440; *People v. Clark*, 5 *Pick.* 206.) Or from a judgment, upon a plea of abatement. (*Browning v. Bancroft*, 5 *Met.* 88; *Morey v. Whittenton Mills*, 8 *Cush.* 374; *Cushing v. Field*, 9 *Met.* 180.) But it does not lie where dismissal was on matters of law apparent on the record. *Hovey v. Crane*, 10 *Pick.* 440; *Bowler v. Palmer*, 2 *Gray*, 553.

48. Foreclosure.—In Wisconsin, an order that an action for the foreclosure of a mortgage should be referred for the purpose of taking testimony, involves the merits of the action, and may be appealed from. *Oatman v. Bond*, 15 *Wis.* 20.

49. Injunction.—An appeal may be taken from an order granting or dissolving, or refusing to grant or dissolve an injunction. (*Laws of Cal.* 1865–6, p. 707; *Cal. Pr. Act*, § 347; *Martin v. Travers*, 7 *Cal.* 253; *Sullivan v. Triunfo G. and S. M. Co.*, 33 *Cal.* 385; *San Francisco v. Beideman*, 17 *Id.* 461; *Crandall v. Woods*, 6 *Id.* 449.) Previous to which latter case an appeal would not lie. (*Richards v. McMillan*, 6 *Cal.* 422.) An appeal from an interlocutory order granting a temporary injunction will not be sustained when such order was superseded by a final decree before appeal taken. (*Easterbrook v. Upton*, 1 *Nev.* 398.) But in *Missouri*, it seems, a refusal to grant an injunction is not a final determination of the cause. (*Tanner v. Irwin*, 1 *Mo.* 65; *Harrison v. Rush*, 15 *Id.* 175.) So, it seems a decree for an injunction in a patent case, and a reference to a master to take an account of profits, is not final. (*Bernard v. Gibson*, 7 *How. U.S.* 650; distinguishing *Forgay v. Conrad*, 6 *Id.* 201.) So, a decree merely dissolving an injunction, without dismissing the bill, is not final. (*McCollum v. Eager*, 2 *How. U.S.* 61; *Young v. Grundy*, 6 *Cranch U.S.* 51; *Hiriart v. Ballou*, 9 *Pet. U.S.* 156; *Gibbons v. Ogden*, 6 *Wheat. U.S.* 448; *Brown v. Swann*, 9 *Pet. U.S.* 1.) Or a decree of the highest court of a State, affirming the decretal order of a State court refusing to dissolve an injunction. *Gibbons v. Ogden*, 6 *Wheat. U.S.* 448.

50. Judgment, Entry of.—An order allowing a motion for the signing of a judgment *nunc pro tunc*, improperly allowed, is appealable. (*Fairchild v. Dean*, 15 *Wis.* 206.) Orders setting aside or refusing to set aside judgments or sales under them are, in Wisconsin, appealable. (*Carney v. La Crosse R.R. Co.*, 15 *Wis.* 503; *Jessup v. City Bank of Racine*, 15 *Wis.* 604.) So in Nevada. (*Ballard v. Purcell*, 1 *Nev.* 342;

Maynard *v.* Johnson, 2 *New.* 16.) In New York, see (Mortimer *v.* Nash, 17 *Abb. Pr.* 229.) An appeal lies from an order of the court below changing the judgment. (Bryan *v.* Berry, 8 *Cal.* 130.) The practice in New York seems to be different. See Butler *v.* Niles, 28 *How. Pr.* 181.

51. Judicial Errors.—If in acting judicially the Court commits an error, the remedy is by appeal, and not by *mandamus*. (People *v.* Pratt, 28 *Cal.* 166.) For an error in law excepted to, an appeal lies without motion for a new trial. (Rice *v.* Gashirie, 13 *Cal.* 53.) Where certain evidence which was essential to sustain a party's defense was erroneously excluded, although no evidence whatever on another point likewise essential to his defense, but not available for that purpose in the absence of said excluded evidence, such error is prejudicial, and ground for reversal on appeal of a judgment rendered against him. Jolley *v.* Foltz, 34 *Cal.* 321.

52. New Trial.—An appeal may be taken from an order granting or refusing a new trial. (*Laws of Cal.* 1865–6, p. 707; *Cal. Pr. Act*, § 336; *N.Y. Code*, § 11; Ketchum *v.* Crippen, 31 *Cal.* 365; Adams *v.* Bush (No. 1), 2 *Abb. Pr. (N.S.)* 104.) But the motion must have been prosecuted before the District Court. (*Cal. Pr. Act*, § 347; Mahoney *v.* Wilson, 15 *Cal.* 42; Frank *v.* Doane *Id.* 303; Green *v.* Doane, *Id.* 304.) Such an appeal brings up the whole record. (Hanscom *v.* Tower, 17 *Cal.* 518; Walden *v.* Murdock, 23 *Id.* 540.) Without such an appeal, the Supreme Court cannot review the evidence, to determine whether the verdict or findings are sustained by it. Green *v.* Butler, 26 *Cal.* 595.

53. Receiver.—An appeal lies from an order refusing to appoint a receiver, in proceedings supplementary to execution against a judgment-debtor. (Heroy *v.* Gibson, 10 *Bosw.* 591; Bailey *v.* Lane, 15 *Abb. Pr.* 373.) Or an order setting aside or opening the biddings on a judicial sale, regular in itself. (Hazleton *v.* Wakeman, 3 *How. Pr.* 357; Wakeman *v.* Price, 3 *Comst.* 334; Buffalo Sav. Bk. *v.* Newton, 23 *N.Y.* 160.) Or an order denying a stay of trial in one cause, until determination of another. (James *v.* Chalmers, 2 *Seld.* 209.) Or refusal to adjourn the hearing before a referee. Carpenter *v.* Haynes, 1 *N.Y. Code R.* 414.

54. Reference.—Granting reference in cases not properly referable is appealable. (7 *Bosw.* 678; Harris *v.* Mead, 16 *Abb. Pr.* 257;

Dickenson v. Mitchell, 19 *Id.* 286.) Or for refusing to enter decree on report of referee. Ludlum v. Fourth Dist. Ct., 9 *Cal.* 7.

55. Special Orders after Judgment.—An appeal may be taken from any special order made after final judgment. (*Laws of Cal.* 1865-6, p. 707; *Cal. Pr. Act*, § 347.) Appeals from orders after judgment are allowed to correct erroneous proceedings subsequent to and founded on a good judgment. (Howard v. Richards, 2 *Nev.* 128.) In Massachusetts, an appeal lies from the decision of a court of common pleas, arresting judgment in a civil action. (Bemis v. Foxon, 2 *Mass.* 141.) An order made by judge at chambers, setting aside an execution. (Bond v. Pacheco, 30 *Cal.* 530.) Or from an order refusing the issuance of an execution, on the grounds of a counter judgment without opposition, to test the right to have the application granted. (Belts v. Carr, 26 *N.Y.* 383; Horton v. Miller, 44 *Penn.* 256.) Or an order refusing to quash an execution. (Gilman v. Contra Costa Co., 8 *Cal.* 52; Cooley v. Gregory, 16 *Wis.* 303.) But not from an order that execution issue. (Mount v. Mitchell, 31 *N.Y.* 356.) An appeal lies from a judgment on a rule of court, dismissing an opposition to an order of seizure and sale. (Heft v. Kelty, 17 *La. An.* 144.) The Act of the District Judge, in granting an order of seizure and sale, is a judicial act, from which an appeal will lie. (Commissioners v. Marks, 16 *Id.* 112.) Or an order denying attachment against party refusing to be examined in supplementary proceedings. Holstein v. Rice, 24 *How. Pr.* 135.

56. Striking Out.—An order striking out from the answer matter constituting a good defense (Rapalee v. Stewart, 27 *N.Y.* 310) may be appealed from.

57. Supplemental Complaint.—An order allowing supplemental complaint to be made may be appealed from. (19 *Abb. Pr.* 293.) Under the Statute of Minnesota, an appeal lies from a decision of referees appointed to assess damages for the occupation of complainant's land. (Paddock v. St. Croix Corporation, 8 *Minn.* 277; Ames v. Mississippi etc. Co., 8 *Id.* 467.) Or from the decision of the County Commissioners, in a controversy about a ferry. Carothers v. Wheeler, 1 *Oregon*, 194.

The following are non-appealable orders in the States where the decisions were rendered.

58. Discretion of Court.—An order or matter resting on the discretion of the Court, or a question of pure practice, does not involve the merits, and is not appealable. (*Jorgensen v. Bockmer*, 9 *Minn.* 181; *Vincent v. Wellington*, 18 *Wis.* 159; *Moore v. Moore*, 14 *Barb.* 27; *Underhill v. Dennis*, 9 *Paige*, 202; *White v. Pomeroy*, 7 *Barb.* 640; *Briggs v. Vandenburg*, 22 *N.Y.* 467; *Rogers v. Holly*, 18 *Wend.* 350; *Rowley v. Van Benthuyssen*, 16 *Id.* 369; *N.Y. Cent. R.R. v. Marvin*, 11 *N.Y.* 279.) As an order granting or refusing a favor. (3 *N.Y. Code R.* 141; 2 *Id.* 41; 1 *Comst.* 43; 2 *E. D. Smith*, 223; *Foshay v. Drost*, 4 *Bosw.* 644.) But the refusal to exercise discretion on the ground of want of power, is error of law, and a ground of appeal. (14 *East*, 395; *Russell v. Conn*, 20 *N.Y.* 81; *McElwain v. Corning*, 12 *Abb. Pr.* 16; *State v. Brannen*, 8 *Jones L. (N.C.)* 208; *Beach v. Chamberlain*, 3 *Wend.* 366; *McMahon v. Mut. Benefit Ins. Co.*, 3 *Bosw.* 644; *Artisans' Bk. v. Treadwell*, 34 *Barb.* 553; *Platt v. Munroe*, 34 *Id.* 291; *Bowen v. Irish Presb. Cong.*, 6 *Bosw.* 245.) Or a palpable abuse of discretion. (*Platt v. Kelly*, 16 *Abb. Pr.* 188.) Or mistake. (*Fields v. Moul*, 15 *Abb. Pr.* 6.) Or an order in statutory proceedings, where limits imposed by legislature, on exercise of discretion, are exceeded. *De Livingston's Petition*, 34 *N.Y.* 555.

59. Discretionary Orders—Parties.—An appeal will not lie from the refusal of the Court to permit a party to be made co-defendant. (*Roberts v. Patton*, 18 *Mo.* 485.) Or from an order making a new party defendant. (*Beck v. San Francisco*, 4 *Cal.* 375.) Or an order denying a motion for leave to intervene. (*Wenborn v. Boston*, 23 *Cal.* 321; *Scheidt v. Sturgis*, 10 *Bosw.* 606.) A motion to renew an action, made with notice to the surviving defendant only, and denied, cannot be appealed from. *Union Bank v. Mott*, 27 *N.Y.* 633.

60. Discretionary Orders—Place of Trial.—Or granting or refusing a change of venue. (*Juan v. Ingoldsby*, 6 *Cal.* 439; *Martin v. Travers*, 7 *Id.* 253; *People v. Stillman*, *Id.* 117.) But in Wisconsin the practice differs, and such an order is appealable. (*Western Bank v. Tallman*, 15 *Wis.* 92.) Or an order refusing to transfer a cause from a State court to a federal court, because of alienage of defendant. *Hopper v. Kalkman*, 17 *Cal.* 517; *Brooks v. Calderwood*, 19 *Id.* 124.

61. Discretionary Orders—Practice.—No appeal lies from an order, regulating a mode of proceeding, and within the judicial discretion. (*Rowley v. Van Benthuyssen*, 16 *Wend.* 369; *Tripp v. Cook*, 26 *Wend.* 143; *Miller v. Porter*, 17 *How. Pr.* 526.) So of an order or decision as to right to begin or close case. (*Fry v. Bennett*, 28 *N.Y.* 324.) Or an order suspending trial to bring in further evidence. (*Phelps v. Ward*, 10 *Bosw.* 617.) Or an order staying proceedings until further direction of the Court. (*Rhodes v. Craig*, 21 *Cal.* 419.) From an order restoring the cause to the calendar for trial. (*Dimick v. Deringer*, 32 *Cal.* 488.) From an order of court refusing to set aside a former order. (*Gates v. Walker*, 35 *Cal.* 289; *Hastings v. Cunningham*, 35 *Cal.* 549; *Henly v. Hastings*, 3 *Cal.* 341; *Horn v. Volcano Wat. Co.*, 18 *Cal.* 141; *Culver v. Hollister*, 17 *Abb. Pr.* 405.) When two orders are made, the latter affirming the former, appeal must be made from the latter. (*Horn v. Volcano Water Co.*, 18 *Cal.* 141.) The party cannot fall back, and seek to reverse the order, by a direct appeal. (*Id.*) No appeal lies from an order of court refusing to set aside an interlocutory judgment. (*Stearns v. Marvin*, 3 *Cal.* 376.) Or an order granting leave to renew a motion. (*Smith v. Spaulding*, 30 *How. Pr.* 339.) Or an order refusing to dismiss a cause for want of prosecution, is not appealable. (*Waldo v. Rice*, 18 *Wis.* 404; *Lamphear v. Lamprey*, 4 *Mass.* 107.) But the dismissal of an action is final. (*Tappan v. Bruen*, 5 *Mass.* 193; *Wood v. Ross*, 11 *Id.* 275.) Or an order refusing to substitute assignee *pendente lite* as party. (*Packard v. Wood*, 17 *Abb. Pr.* 318.) Or striking out cause from general term calendar. *Cotes v. Smith*, 31 *How. Pr.* 146.

62. Interlocutory Orders.—An order which does not determine the controversy, but leaves it to proceed, is not appellate. (*Illius v. N.Y. and N. H. R.R. Co.*, 3 *Kern.* 597; *Kanouse v. Martin*, 6 *How. Pr.* 240; *Duane v. Northern R.R. Co.*, 3 *Comst.* 545.) An appeal will not lie from an interlocutory order, except in cases provided by statute. (*People v. Thurston*, 5 *Cal.* 517; *Juan v. Ingoldsby*, 6 *Cal.* 439; *De Barry v. Lambert*, 10 *Id.* 503; *Baker v. Baker*, 10 *Id.* 527; *Harris v. Clark*, 4 *How. Pr.* 78; *Cruger v. Douglass*, 2 *Comst.* 571; *Chittenden v. Missionary Society*, 8 *How. Pr.* 327; *Swarthout v. Curtis*, 4 *Comst.* 415.) Or an order denying a rehearing of a decree of this nature. *King v. Merchants' Exch. Co.*, 1 *Seld.* 547.

63. Interlocutory Orders.—An appeal does not lie from an order for judgment on a frivolous answer. (*Dunham v. Nicholson*, 4

How. Pr. 140.) Or an order striking out scandalous matter. (*Opdyke v. Marble*, 18 *Abb. Pr.* 375.) Or striking out an answer as sham or irrelevant. (*Briggs v. Bergen*, 23 *N.Y.* 162.) Or an order for judgment on partial demurrer. (*Paddock v. Springfield Fi. and Mar. Ins. Co.*, 2 *Kern.* 591.) Or an order overruling a demurrer. (*Bennett v. Nichols*, 12 *Mich.* 22; *Ford v. David*, 13 *How. Pr.* 193; *Rutherford v. Fisher*, 4 *Dall. U.S.* 22.) Or an order sustaining a demurrer. (*Geyer's Dig.* 261; 4 *Dall.* 22, 160; 6 *Cranch U.S.* 51; *Miners' Bank v. United States*, 5 *How. U.S.* 215; *Blakely v. Fisk*, *Hempst.* 11; *Stetson v. Exchange Bank*, 7 *Gray*, 425; *Maher v. Dougherty*, 11 *Gray*, 16.) In Minnesota, under the Statute of 1861, an appeal is allowed from any order made upon a demurrer. (*St. Paul Division v. Brown*, 9 *Min.* 151.) So in Massachusetts, for the cause that the declaration does not state a legal cause of action. (*Amherst R.R. Co. v. Watson*, 4 *Gray*, 61.) An appeal in a criminal case may be taken from an order allowing a demurrer, though final judgment be not entered. *People v. Logan*, 1 *Nev.* 110.

64. Interlocutory Orders—Costs.—An appeal does not lie from an order correcting an award of costs on *certiorari*. (*People v. Robinson*, 25 *How. Pr.* 345.) Or awarding costs against executor refusing to refer. (*Niblo v. Binsse*, 31 *Id.* 476.) Or requiring a receiver to give security for costs. (*Bolles v. Duff*, 17 *Abb. Pr.* 448.) Or from an order made on a motion to retax costs. The error can be revised only on an appeal from the judgment. (*Laskey v. Davis*, 33 *Cal.* 677.) Or an order allowing costs on a peremptory mandamus. (*People v. Albright*, 14 *Abb. Pr.* 305.) Or an order made on motion to open a judicial sale on grounds not affecting the regularity of the proceedings. (*Kingsland v. Bartlett*, 28 *Barb.* 480.) Or an order setting aside a verdict as against the weight of evidence. *Young v. Davis*, 30 *N.Y.* 134.

65. Interlocutory Orders—Evidence.—An appeal does not lie from a decision that a deposition is or is not regularly taken. (*Hix v. Fisher*, 1 *Wins. (N.C.) No. 2 (L.)* 84.) Or from an order refusing to issue a commission to take testimony. (*People v. Stillman*, 7 *Cal.* 117.) Or an order striking out interrogatories attached to a pleading. (*Davenport Co. v. Davenport*, 15 *Iowa*, 6.) Or an order admitting affidavits on motion. (*Childs v. Fox*, 18 *Abb. Pr.* 112.) Or stopping cross-examination, unless in case of manifest abuse or injustice. *Great Western Turnpike Co. v. Loomis*, 32 *N.Y.* 127.

66. Interlocutory Orders—New Trial.—An appeal does not lie from an order denying motion for new trial on ground of surprise. (*Selden v. Del. and Hud. Canal Co.*, 29 *N.Y.* 634; *Badel v. Chase*, 34 *N.Y.* 386; *Wavel v. Wiles*, 24 *N.Y.* 635; *White v. Harvey*, 23 *Ind.* 55.) Or refusing to amend an order allowing time to move for a new trial. (*Pendegast v. Knox*, 32 *Cal.* 73; *Quivey v. Gambert*, *Id.* 304.) Or striking out or refusing to strike out a statement made on motion for a new trial. (*Ketchum v. Crippen*, 31 *Cal.* 365; *Genella v. Relyea*, 32 *Cal.* 159; *Pendegast v. Knox*, 32 *Id.* 73; *Quivey v. Gambert*, *Id.* 304.) Or from an order denying a motion to certify a statement. (*Genella v. Relyea*, 32 *Cal.* 159.) Or directing such statement to be settled. (*Leffingwell v. Griffing*, 29 *Cal.* 192.) Upon a bill for relief against a judgment at law, a decree granting a new trial on terms, and not dismissing the bill, on making the injunction perpetual, is an interlocutory order, and not appealable. *Lea v. Kelly*, 15 *Pet. U.S.* 213.

67. Interlocutory Orders—Receiver.—An appeal does not lie from an order directing a receiver to distribute the funds in his hands. (*Adams v. Woods*, 21 *Cal.* 165; *Whitney v. Buckman*, 26 *Cal.* 451.) Or as to appointment or substitution of receiver. (*Siney v. N.Y. Consol. Stage Co.*, 29 *How. Pr.* 481; *Janeway v. Green*, 16 *Abb. Pr.* 215.) Or refusal to allow receiver to commence action. *Petition of Reeve*, 34 *N.Y.* 359.

68. Interlocutory Orders—Reference.—An appeal does not lie from an order granting a reference in referable causes. (*N.Y. Code*, § 349; 9 *How. Pr.* 69; 7 *Id.* 359; 10 *Id.* 89; *Hatch v. Wolf*, 30 *How. Pr.* 65; *Whitaker v. Desfosse*, 7 *Bosw.* 678; *Kennedy v. Shilton*, 1 *Hill.* 546; 9 *Abb. Pr.* 157.) Or an order setting aside the report of a referee appointed to take an account. (*Johnson v. Dopkins*, 6 *Cal.* 83.) Or the findings of a referee in a divorce case. (*Baker v. Baker*, 10 *Cal.* 527.) Or as to decisions of a referee in relation to alimony. (*Forrest v. Forrest*, 25 *N.Y.* 501.) Or an order overruling exceptions to a referee's report. (*Peck v. Curtis*, 31 *Cal.* 207.) Or refusal of referee to allow cause to be opened after resting. (*Thomas v. Fleury*, 26 *N.Y.* 26.) In Nevada, no appeal can be taken from an order made by a referee. *Hamilton v. Kneeland*, 1 *Nev.* 40.

69. Interlocutory Orders—Vacating Judgment.—An appeal lies direct from a judgment, but not from an order refusing to set it aside. (*Peralta v. Castro*, 15 *Cal.* 511; *Williams v. Schimmerhorn*, 8

Jones L. (N.C.) 104; *Maples v. Geller*, 1 *New.* 233; *Fort v. Bard*, 1 *Comst.* 43; *Schermerhorn v. Mohawk B'k*, 1 *Id.* 125; *Spaulding v. Kingsland*, 1 *Id.* 426; *Carpenter v. Carpenter*, 4 *How. Pr.* 139; *Whitaker v. Desfosse*, 7 *Bosw.* 678; *Lewis v. Graham*, 16 *Abb. Pr.* 126; *Millard v. Van Raust*, 17 *Abb. Pr.* 319; *Farish v. Corlies*, 1 *Daly*, 274; *Fassett v. Tallmadge*, 15 *Abb. Pr.* 205.) On the ground of irregularity. (*Jones v. Derby*, 16 *N.Y.* 242; *Sherman v. Felt*, 2 *Comst.* 186; *Ingersol v. Bostwick*, 22 *N.Y.* 425; *Anon.*, 18 *Abb. Pr.* 87; *Christopher v. Austin*, 1 *Kern.* 216; *Johnson v. Carnley*, 6 *Seld.* 570; *Lake Ontario, Auburn and N.Y. R.R. Co. v. Marvin*, 18 *N.Y.* 585; *McCormick v. Pickering*, 4 *Comst.* 276; *Cathin v. Billings*, 16 *N.Y.* 622; *Pendleton v. Weed*, 17 *N.Y.* 72.) But an order vacating a judgment by confession, on account of a defect in the statement, was held appealable. (*Belknap v. Waters*, 1 *Kern.* 477.) Or refusing to set aside an execution merely voidable. *Bank of Genessee v. Spencer*, 18 *N.Y.* 150.

70. Void Order.—It is not necessary to appeal from a void order which can have no operation or effect. *Killip v. Empire Mill Co.*, 2 *New.* 34.

TIME IN WHICH TO APPEAL.

71. An appeal may be taken: *First*, From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the rendition of the judgment. (*Cal. Pr. Act*, § 336; *Waggenheim v. Hook*, 35 *Cal.* 216; *Gray v. Palmer*, 28 *Cal.* 416; *Halleck v. Jaudin*, 34 *Cal.* 167.) The one year commences to run from the time the judgment is rendered by the Court, and not from the time it is entered in the judgment book by the Clerk. (*Gray v. Palmer*, 28 *Cal.* 416; *Peck v. Courtis*, 31 *Id.* 207; *Genella v. Relyea*, 32 *Cal.* 159; *Hall v. Beggs*, 17 *La. An.* 238.) From the time it is announced by the Court and entered in the minutes. (*Wetherbee v. Dunn*, 35 *Cal.* 249.) As to practice elsewhere, see (*State v. Pepper*, 7 *Mo.* 348; *Adams v. Fox*, 27 *N.Y.* (13 *Smith*) 640; *Bradley v. Van Zandt*,

3 *C.R.* 207; *McMahon v. Harrison*, 5 *How. Pr.* 350; see *People v. Wilson*, 12 *Mich.* 25; *Cameron v. Sullivan*, 15 *Wis.* 510.) The right of appeal depends upon the *rendition*, not the entry of judgment. *Cal. St. Pel. Co. v. Patterson*, 1 *Nev.* 151.

72. The Supreme Court cannot enlarge the time fixed by statute. (*Mart. N.C.* 39; 1 *Paige*, 423; 5 *Wend.* 136; *Hump. Tenn.* 60; *Dooling v. Moore*, 20 *Cal.* 141; *Murdock v. De Vries*, *Cal. Sup. Ct., Jul. T.*, 1859; *Gimmy v. Doane*, 22 *Cal.* 635; *Gray v. Palmer*, 28 *Id.* 416; *Peck v. Courtis*, 31 *Id.* 207; *Genella v. Relyea*, 32 *Id.* 159; *Wait v. Van Allen*, 22 *N.Y.* 319; *Rowell v. McCormick*, 5 *How. Pr.* 337; *Sherman v. Wells*, 14 *How. Pr.* 522; *Caldwell v. Mayor of N.Y.*, 9 *Paige*, 572; *Bank of Monroe v. Widner*, 11 *Id.* 529; *Stone v. Morgan*, 10 *Paige*, 615; *Barclay v. Brown*, 7 *Id.* 245; *Gay v. Gay*, 10 *Id.* 369; *Lindsley v. Almy*, 1 *C.R.* 139; *People v. Eldridge*, 7 *How. Pr.* 108; grounded on the decision in *Ends v. Thomas*, 5 *How. Pr.* 351; *Marston v. Johnson*, 13 *How. Pr.* 93; *Fry v. Bennett*, 7 *Abb. Pr.* 352; on the decision in *Humphrey v. Chamberlain*, 1 *Kern*, 274), which decides that that power cannot be exercised directly or indirectly, either by amendment or otherwise, and that a stay of proceedings does not extend time for appeal. *Renouil v. Harris*, 2 *Sandf.* 641; and see *Cadwell v. Mayor of Albany*, 9 *Paige*, 572; *Gallt v. Finch*, 24 *How. Pr.* 193; *Morris v. Morange*, 25 *How. Pr.* 247; *Salls v. Butler*, 27 *How. Pr.* 133.

73. As to the power of the Court to enlarge the time for appealing, the New York authorities bear both ways. The power is claimed under Section 173 of the

New York Code, and is strongly asserted in (*Crittenden v. Adams*, 5 *How. Pr.* 310; *Traver v. Silvernail*, 2 *Code R.* 95; *Seely v. Pritchard*, 12 *N.Y. Leg. Obs.* 245; 3 *Duer*, 669; *Toll v. Thomas*, 18 *How. Pr.* 324.) But the power should be sparingly and cautiously exercised. (*Haase v. N.Y. Cent. R.R. Co.*, 14 *How. Pr.* 430.) It appears that, in New York, notice of the judgment or order should in all cases be given before the time for appeal commences to run. (2 *Whit. Pr.* 719.) Such notice cannot be given by anticipation, nor till judgment or order has been perfected by entry or filing of the judgment roll, or by entry or filing of the order in a special proceeding or after judgment rendered. *Fry v. Bennett*, 16 *How. Pr.* 385; 7 *Abb. Pr.* 352; 2 *Bosw.* 684; *Leavy v. Roberts*, 2 *Hilt.* 285; 8 *Abb. Pr.* 310; *Sherman v. Wells*, 14 *How. Pr.* 522; *Bank of Geneva v. Hotchkiss*, 5 *How. Pr.* 478; *McMahon v. Harrison*, 5 *How. Pr.* 350; *Bradley v. Van Zandt*, 3 *C.R.* 217.

74. An appeal must be taken: *Second*, From a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of such judgment. (*Cal. Pr. Act*, § 335.) So, from judgment of a county court, rendered on appeal from a justice's court (*Dooling v. Moore*, 20 *Cal.* 141), in cases of law. But it may be taken on the same day that judgment is entered. (*Blydenburg v. Cotheal*, 5 *How. Pr.* 200; *Jones v. Porter*, 6 *How. Pr.* 285.) An appeal perfected on the same day of the filing of the judgment roll, but before the hour when the roll was filed, is nevertheless regular. The law does not regard fractions of a day, except to prevent injustice. (3 *Cow.* 99; 3 *Den.* 263; *Blydenburgh v. Cotheal*, 4 *N.Y.* 418.)

But where any steps have been taken in good faith, the Court has power under the Statute to allow an amendment *nunc pro tunc* to supply the defect. *Lake Ont. Aub. and N.Y. Co. v. Marvine*, 18 *N.Y.* 585; *Aldrich v. Ketchum*, 12 *N.Y. Leg. Obs.* 319; *Fry v. Bennett*, 7 *Abb. Pr.* 352; *Mallory v. Wood*, 14 *How. Pr.* 67; *Haase v. N.Y. Cent. R.R. Co.*, 14 *How. Pr.* 430; *Sherman v. Wells*, *Id.* 522; *Enos v. Thomas*, 5 *How. Pr.* 361; *Crittenden v. Adams*, *Id.* 310; *Seeley v. Pritchard*, 3 *Duer*, 669; *Church v. Rhodes*, 6 *How. Pr.* 281; *Jellinghaus v. N.Y. Ins. Co.*, 5 *Bosw.* 678.

75. The right of a party to appeal from an order is not cut off until the statutory time, after service upon him of a written notice of the making of such order. (*Corwith v. State Bank*, 18 *Wis.* 560.) Sunday is not to be excluded from the computation of the time. (*Ex parte Simpkins*, 2 *Ellis & E.* 392.) In the absence of any limit of time, the courts will infer a *reasonable* time in taking appeals from the land office in Oregon to the general land office. (*Moore v. Fields*, 1 *Oregon*, 317.) But this is not the practice in California. After appealing from a judgment alone, a party may appeal from an order refusing a new trial within the statute time. *Marziou v. Pioche*, 8 *Cal.* 522; *Carpentier v. Williamson*, 25 *Cal.* 154.

76. If appeal be taken in the same notice from both the final judgment and the order refusing a new trial after sixty days, the appeal from the order will be dismissed. (*Lower v. Knox*, 10 *Cal.* 480.) A party neglected to appeal from an order vacating a judgment in his favor, but, nearly a year after it was made, moved to set it aside, and appealed from the order denying

that motion. *Held*, that the appeal would not lie, as it would be a palpable evasion of the Statute limiting the time for appeals from orders. (*Von Steemoyck v. Miller*, 18 *Wis.* 320.) A motion to set aside a judgment for irregularity does not suspend the time for appealing. (*Renouil v. Harris*, 2 *Sandf.* 641; 2 *C.R.* 71.) The objection that appeal has not been taken in time is subject to waiver by acceptance of service of notice. *Struver v. Ocean Ins. Co.*, 2 *Hilt.* 475.

77. An appeal may be taken, *Third*, From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court. (*Cal. Pr. Act*, § 336.) So, for refusing a new trial. (*Brown v. Tolles*, 7 *Cal.* 398; *Towdy v. Ellis*, 22 *Cal.* 650; *Waggenheim v. Hook*, 35 *Cal.* 216.) So, also, for refusing to vacate an award on certain grounds specified in the motion; (*Fairchild v. Doten*, *Cal. Sup. Ct., Jul. T.*, 1869;) after the order is made and entered in the minutes of the court. *Peck v. Vandenburg*, 30 *Cal.* 11; *Hihn v. Peck*, 30 *Cal.* 280; *Peck v. Courtis*, 31 *Cal.* 207.

78. An order cannot be appealed from before actual entry. (*Whittaker v. Desfosse*, 7 *Bosw.* 678; *Platt v. Kelly*, 16 *Abb. Pr.* 188; *Gallt v. Finch*, 24 *Bosw.* 193.) Nor will an appeal lie from a mere order to show cause. (*Watt v. Watt*, 30 *How. Pr.* 345.) The time within

which an appeal from a final order in a special proceeding, or in an action, after judgment, must be taken, is in the New York practice left vague and uncertain by the Code, §§ 331, 332. An appeal cannot be taken from an order granting a new trial upon application made after the term. Such an order is not final. (*House v. Wright*, 22 *Ind.* 383.) An appeal to the Supreme Court must, under the Statutes of Missouri (*R. S.* 1855, 1,287, § 11), be taken during the term at which the judgment or decision was rendered. *Stavely v. Kunkel*, 27 *Mo.* 422.

WHO MAY APPEAL.

79. Any party aggrieved may appeal from the district courts to the Supreme Court of this State, in any judgment or order in a civil action, except in cases expressly made final by statute. (*Cal. Pr. Act*, §§ 333, 335; 1 *N.Y. Code*, § 325; *Senter v. Bernal*, *Cal. Sup. Ct.*, *Oct. T.*, 1869; *Adams v. Woods*, 8 *Cal.* 306; *State v. Judge Third District Court*, 17 *La. An.* 320; *Zumwalt v. Zumwalt*, 3 *Mo.* 269.) "By any party" is to be understood, any person who is a party to the action. (*Senter v. Bernal*, *Cal. Sup. Ct.*, *Oct. T.*, 1869.) He may appeal, although not a party to the record. (*Adams v. Woods*, 8 *Cal.* 306; *Montgomery v. Leavenworth*, 2 *Id.* 57.) Nor can a party appeal unless he is aggrieved by the decision—that is, if he has no interest prejudiced thereby. (*Foster v. Prince*, 8 *Abb. Pr.* 407; *Idley v. Bowen*, 11 *Wend.* 227; *Reid v. Vanderheyden*, 5 *Cow.* 719; *Kelly v. Israel*, 11 *Paige*, 147; *Hughes v. Stickney*, 13 *Wend.* 280; *Fairbanks v. Corlies*, 3 *E. D. Smith*, 582.) Or if he had an interest, but has since lost it.

Mills *v.* Hoag, 7 *Paige*, 18; Cusack *v.* Gilbert, 5 *Bro. P.C.* 471.

80. If in a suit against a party alleged to be the owner of real estate, and against the real estate, to recover delinquent taxes, judgment is rendered in favor of such party, and against the real estate, he has no ground for appeal, his answer having averred that he did not own the real estate at the time it was assessed. (*People v. Wilson*, 26 *Cal.* 127.) As to who is the party aggrieved, the test is found in the question, "Would the party have had the thing if the erroneous judgment had not been given?"—if yea, then he is the party aggrieved. *Adams v. Woods*, 8 *Id.* 306.

81. Every party whose interest in the subject matter of the appeal is adverse, or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an "adverse party." (*Senter v. Bernal*, *Cal. Sup. Ct.*, Oct. T., 1869; *Ely v. Frisbie*, 17 *Cal.* 250.) A subsequent incumbrancer cannot object to a judgment of foreclosure rendered against the mortgagor and himself, unless he shows that he will sustain injury from it. *Mann v. Thayer*, 18 *Wis.* 479.

82. **Joint Appeal.**—All parties pleading jointly, may join in appeal from decision on their pleading, though review is sought on a point available to one only. (*Bank of Cooperstown v. Corlies*, 1 *Abb. Pr. (N.S.)* 412.) Less than all the defendants in a joint decree cannot appeal without a summons and severance in the court below. (*Musina v. Cavoza*, 20 *How. U.S.* 280; *Smith v. Clark*, 12 *How. U.S.* 21.) From the interlocutory judgment upon such issue appeals may be taken by the party aggrieved, without making any persons parties to the appeal except such as were parties to the issue; but no appeal from the *whole* of the final judgment can be made effectual, unless all of the parties to

it are made parties to the appeal, either as appellants or respondents; for such a judgment cannot be reversed without affecting the interest of all who are parties to it. *Senter v. Bernal*, *Cal. Sup. Ct., Oct. T.*, 1869.

83. Parties to the Record.—No persons but those who are parties to the record can be permitted to be heard on an appeal. (*Senter v. Bernal*, *Cal. Sup. Ct., Oct. T.*, 1869; *Harrison v. Nixon*, 9 *Pet.* 483; *Fish v. Johnson*, 16 *La. An.* 29; *Re Bristol*, 16 *Abb. Pr.* 397; 28 *Barb.* 299; *Martin v. Kanouse*, 2 *Abb. Pr.* 390.) Except a purchaser at a judicial sale. (*Delaplaine v. Lawrence*, 10 *Paige*, 602; *Bailey v. Maule*, 7 *Clark & Fin.* 121; *Mortimer v. Nash*, 17 *Abb. Pr.* 229.) A subsequent lien holder may appeal from a direction in a foreclosure decree ordering the sale of mortgaged property for gold coin only. (*Miller v. Cherry*, 2 *Nev.* 165.) A defendant who neither answered nor appeared at any stage of the proceedings, for the purpose of contesting any step taken against him, cannot appeal. (12 *Johns.* 493; 2 *Cow.* 31; 8 *Wend.* 219; *Murphy v. American Life Ins. and Trust Co.*, 25 *Wend.* 249.) Where some of several defendants make default and others answer, the defaulting defendants may appeal. (*Gimmey v. Doane*, 22 *Cal.* 534.) A party in whose favor a decision is made may appeal therefrom. (*Parker v. Newland*, 1 *Hill*, 87.) Third persons not interested in the suit should not be made parties on appeal. (*Patten v. Powell*, 16 *La. An.* 128.) So in equity. (*Thompson v. Cox*, 8 *Jones L. (N.C.)* 311.) But it would seem that third persons, though not parties to the cause, may appeal when they allege that they have been aggrieved by the judgment. (*Cal. Pr. Act*, §§ 333, 335; *Patten v. Powell*, 16 *La. An.* 128; see *Webb v. Hansen*, 3 *Cal.* 65; see, also, 2 *Id.* 133.) That the appellant has no interest in the decree from which he appeals cannot be allowed to defeat the appeal. *Ricketson v. Compton*, 23 *Cal.* 636.

84. Right of Appeal.—The right of appeal provided for in Section 347 of the Practice Act is concurrent with the remedies provided for in Sections 334 and 118 of the same Act. (*Sullivan v. Triunfo G. and S. Min. Co.*, 33 *Cal.* 385.) The fact that a decree sought to be appealed from has been executed does not deprive the party of his right of appeal. (*Peer v. Cookerow*, 1 *McCarter (N.J.)* 361.) Notice of entry of judgment, served before costs are finally adjusted, does not have the effect to limit the right of appeal. (*Champion v. Plymouth Society*, 42 *Barb.* 441.) The right of appeal must be governed by the

laws in force at the time the appeal is taken. (*Hamilton v. Kneeland*, 1 *Nev.* 60.) The fact that parties to an action were citizens of different States does not authorize an appeal to the Supreme Court of the United States after decision by the Supreme Court of the State. (*Hamilton v. Kneeland*, 1 *Nev.* 60.) Residence out of the state for several years is no ground for denying the right to appeal. (*Ricketson v. Compton*, 23 *Cal.* 636.) Counsel opposing a motion to dismiss an action for want of prosecution, by stating that sooner than comply with the order to amend previously made, they would allow the complaint to be dismissed, and present the case on appeal, do not thereby waive the right to appeal. (*Lahens v. Fielden*, 15 *Abb. Pr.* 177.) The voluntary payment of costs on appeal is not a waiver of the right to an appeal. (*Tyson v. Wells*, 1 *Cal.* 378; *Champion v. Plymouth Society*, 42 *Barb.* 441.) Where all the defendants will not join in an appeal, the appellant must summon the others and sever from them. (*Perry v. Block*, 1 *Mo.* 484.) The maker of a promissory note can bring an appeal from a judgment against himself and indorser jointly. (*Morgner v. Birkhead*, 34 *Mis.* 214.) A married woman, assisted and authorized by her husband in bringing the suit, must join him on the appeal. *Reese v. Conyer's*, 16 *La. An.* 39.

85. Separate Appeal.—Any one of several parties, even upon the same side, may appeal without the concurrence of his co-parties. (*Mattison v. Jones*, 9 *How Pr.* 152; *Giraud v. Beach*, 4 *E. D. Smith*, 27; overruling *Farrell v. Calkins*, 10 *Barb.* 348; see, also, *Peer v. Cookerow*, 1 *McCarter (N. J.)* 361.) Or he may appeal for them all, but cannot afterwards withdraw his appeal as to his co-defendants. (*Bonner v. Campbell*, 48 *Penn. St.* 286.) In cases of maritime tort against two respondents, if they do not assume a joint defense, each may appeal separate from the other. (*Thomas v. Lane*, 2 *Sumn.* 1.) So in equity. *Forgay v. Conrad*, 6 *How. U.S.* 201.) Where a judgment is not appealed from by one party, an error in favor of the other cannot be corrected. *Delassus v. Poston*, 19 *Mo.* 425.

86. Substituted Party.—Upon the death or disability of a party pending an appeal, his representative shall be substituted in the suit, by suggestion in writing to the Court on the part of such representative, or of any party on the record. (Rule xiv. *Sup. Ct. of Cal.*; *Beach v. Gregory*, 2 *Abb. Pr.* 203; *Miller v. Gunn*, 7 *How. Pr.* 159; *Hastings v. McKinley*, 8 *How. Pr.* 175.) The death of an appellant, after argument of his case on appeal, does not constitute any ground

for delaying a decision, or departing from the ordinary procedure, except as to the entry of judgment. (*Black v. Shaw*, 20 *Cal.* 68.) The rule is different if the death occurs previous to argument. (*Id.*) The entry of judgment should be a day anterior to the appellant's death. (*Black v. Shaw*, 20 *Cal.* 68.) But where the appellate court, not aware of the appellant's death, rendered judgment of affirmance, upon subsequent suggestion this judgment will be vacated, and a judgment of affirmance rendered as of a day previous to the death, *nunc pro tunc*. *Black v. Shaw*, 20 *Cal.* 68; *Savings and Loan Society v. Gibb*, 21 *Cal.* 609.

APPEALS, HOW TAKEN.

87. There is no distinction as to the words of taking and perfecting appeal, or as to the effect of them, between cases at law and cases in equity. (*Laws of Cal.* 1861, p. 589; *Lyons v. Lyons*, 18 *Cal.* 447.) The rule as laid down in (*Walker v. Sedgwick*, 5 *Cal.* 192) being changed. Three things are necessary to the taking and perfecting an appeal: *First*, Filing notice; *Second*, Service of the same; *Third*, Filing the undertaking; all within the times limited by statute. (*Hastings v. Halleck*, 10 *Cal.* 31.) The period cannot be abridged by error or negligence of the appellant. *Hastings v. Halleck*, 10 *Cal.* 31.

88. It is always within the power of the Court to extend the time fixed by law, when the ends of justice would seem to demand it. (*Wood v. Forbes*, 5 *Cal.* 62.) In all cases where an appeal is given by statute, the remedy is exclusive, and must be pursued. (*Haight v. Gay*, 8 *Cal.* 297.) A remedy cannot be extended beyond the provisions of the statute which gives it, and if the act does not give an appeal, none lies. (*United States v. Nourse*, 6 *Pet. U.S.* 470.) If the act conferring the jurisdiction expires, the jurisdiction ceases, al-

though the appeal or writ of error be actually pending in the Court at the time of the expiration of the act. 8 *How. Pr.* 121; 1 *Hill*, 328; 9 *Barn. & Cres.* 750; 3 *Burr.* 1,456; 4 *Moore & Payne*, 341; *McNulty v. Batty*, 10 *How. U.S.* 72.

89. An appeal may be brought by any organized or incorporated city or town, in the State or County, by filing and serving notice of appeal as above, without the filing of a bond or the payment of costs. (*Laws of Cal.* 1856, p. 26.) The mayor, attorney, or chief officer of any city, or District Attorney or president of the Board of Supervisors of any county, shall have power to give the required notice on appeal. *Laws of Cal.* 1856, p. 26.

90. A party cannot appeal a second time from the same judgment, the first appeal having been dismissed. (*Brill v. Meek*, 20 *Mo.* 358.) The rule is otherwise in California. Where an appeal is dismissed for want of a proper bond, and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez v. Gallardo*, 5 *Cal.* 155; see *Dooling v. Moore*, 19 *Cal.* 81; *Gordon v. Wansey*, 19 *Id.* 82.

PERFECTING APPEALS.

91. An appeal is perfected when a proper undertaking, with an affidavit of the sureties, has been executed, and notice of appeal served on the adverse party and the Clerk, and from that time proceedings are stayed. (*Ford v. Thompson*, 19 *Cal.* 118; *Pierson v. McCahil*, 23 *Cal.* 249; *Thompson v. Blanchard*, 2 *N.Y.* 561.) In Missouri, where the recognizance is entered into by one

of two defendants only, the appeal is well taken. (*Sargeant v. Sharp*, 1 *Mo.* 601.) Until an appeal is taken, there is nothing to give effect to an undertaking. (*Buckholder v. Byers*, 10 *Cal.* 481.) Perfecting an appeal does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 *Cal.* 277.

92. It is also provided by statute that when the appeal is perfected, as prescribed in the preceding sections, all further proceedings are stayed until the final disposition of the matter operates as a stay. (*Thornton v. Mahony*, 24 *Cal.* 584; *Bryan v. Berry*, 8 *Cal.* 135; *Woodbury v. Bowman*, 13 *Cal.* 634; *Karth v. Light*, 15 *Cal.* 327; *Chamberlin v. Reed*, 16 *Id.* 207; *Merced Mining Co. v. Fremont*, 7 *Cal.* 132; *Sherman v. Dilley*, 3 *Nev.* 21; *Chase v. Beraud*, 29 *Id.* 138.) In all cases in appeal not otherwise specially provided for. (*Merced Mining Co. v. Fremont*, 7 *Cal.* 132; *Firemans' Ins. Co. of Albany v. Bay*, 3 *How. Pr.* 424; *Colman v. Rowe*, 4 *Swe. & M.* 747; *Smith v. Norval*, 2 *Code R.* 14; *Chemung Canal Bank v. Judson*, 10 *How. Pr.* 133; *McMahon v. Allen*, 22 *How. Pr.* 193; 13 *Abb. Pr.* 126; *Griswold v. Fowler*, 15 *Abb. Pr.* 368; *Valton v. National Loan Fund Life Ins. Association*, 19 *How. Pr.* 515.) So, on appeal from order refusing a change of venue. (*Pierson v. McCahill*, 23 *Cal.* 249.) Or from an order granting a new trial. (*Ford v. Thompson*, 19 *Cal.* 118.) Or upon an order granting an injunction. (4 *Abb. Pr.* 285; 13 *Johns.* 139; 6 *Cranch*, 51; *Genni v. Chadsey*, 12 *Abb. Pr.* 69; *Howe v. Leaving*, 6 *Bosw.* 684; *Wood v. Dwight*, 7 *Johns. Ch.* 295; *Hart v. Masons of Albany*, 3 *Paige*, 381.) But it will not dissolve or suspend an injunction. *Merced Mining Co. v. Fremont*, 7 *Cal.* 130; *Hicks v. Michael*, 15 *Cal.* 109.

EFFECT OF APPEAL.

93. The title of an action is not changed by an appeal. (*Johnson v. Yeomans*, 8 *How. Pr.* 140.) It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted. (*Marbury v. Madison*, 1 *Cranch U.S.* 137.) The taking an appeal does not operate to discharge an attachment. (*Spencer v. Rogers Locomotive Works*, 13 *Abb. Pr.* 180.) Nor can a party have an order superseding an execution, levied before his appeal. (3 *Hill*, 47; 18 *Wend.* 581; 7 *Paige*, 607; 10 *Id.* 169; *Rathbone v. Morris*, 9 *Abb. Pr.* 213; *Matter of Berry*, 26 *Barb.* 55; *Cook v. Dickerson*, 1 *Duer.* 679.) But on motion it may be proper to supersede an execution where appeal is taken in good faith, and the security is ample. (*Strecker v. Wakeman*, 13 *Abb. Pr.* 85.) An appeal from a decree for an injunction, duly perfected, will suspend proceedings to punish its violation. *Howe v. Searing*, 6 *Bosw.* 684.

94. As to effect of appeal on judgment lien, consult (*Lowe v. Adams*, 6 *Cal.* 277; *Dewey v. Latson*, *Id.* 130; *Chapin v. Broder*, 16 *Cal.* 403; *Englund v. Lewis*, 25 *Id.* 337.) From an order of reference. (*Smith v. Pollock*, 2 *Cal.* 92.) From an order confirming a survey of a Mexican grant. (*Thornton v. Mahoney*, 24 *Cal.* 569.) From a decision of a United States land register. To the Commissioner of the General Land Office, upon a location under a school land warrant, suspends the right of the applicant for location. (*Dolhequay v. Tabor*, 22 *Cal.* 279.) But as to its effect as a stay generally, see (*Tiers v. Carnaham*, 3 *Abb. Pr.* 69.) Where

the decree merely directs certain payments to be made, it is sufficient as a stay of proceedings. (*Curtis v. Leavitt*, 10 *How. Pr.* 481.) The stay of proceedings denied from taking an appeal does not prevent a filing of the transcript previously procured. (*Blakeley v. Keteltas*, 3 *Sandf.* 749.) It does not prevent the party who by the judgment appealed from was declared to be entitled to the office from proceeding to compel the delivery of books and papers to him. *Welch v. Cook*, 7 *How. Pr.* 282.

No. 1042.

Notice of Appeal.

[TITLE.]

Please take notice, that the [plaintiff] in the above-entitled action hereby appeals to the Supreme Court of this State, from the [judgment] therein made and entered, in the said District Court, on the . . . day of . . . , in favor of the [defendant] in said action, and against said [plaintiff], and from the whole thereof.

[DATE]

[SIGNATURE.]

To the Clerk of said District Court,
and to E.D., Attorney for C.G.

95. Amendment of Notice.—A notice when served is amendable in respect of defects which do not destroy its substantial character. (*Fry v. Bennett*, 16 *How. Pr.* 385.) And mere formal errors may be disregarded. *People v. Tarbell*, 17 *Id.* 120; *Lake Ontario, Auburn and New York Railroad Co. v. Marvines*, 18 *N.Y.* 585; see *Aldrich v. Ketchum*, 12 *N.Y. Leg. Obs.* 319.

96. Filing Notice.—The filing of the notice of appeal must precede or be contemporaneous with the service of the same. (*Cal. Pr. Act*, § 337; *Senter v. Bernal*, *Cal. Sup. Ct.*, *Oct. T.*, 1869; *Hastings v. Halleck*, 10 *Cal.* 31; *Buffendeau v. Edmondson*, 24 *Id.* 94; *Moulton v. Ellmaker*, 30 *Cal.* 527; *Boston v. Haynes*, 31 *Cal.* 107; *Foy v. Domec*, 33 *Cal.* 317; *Lynch v. Dunn*, 34 *Cal.* 518; see *McCaiber v. Lecompte*, 15 *Mo.* 78; *Pratte v. Corl*, 9 *Id.* 162.) That the filing must precede the filing of the undertaking, see (*Dooling v. Moore*, 19 *Cal.* 81; *Buchholder v. Byers*, 10 *Cal.* 481.) The appellant cannot, by serving a copy of the notice of appeal before the original is filed, keep the respondent watching the Clerk's office to see when the required undertaking is filed. *Hastings v. Halleck*, 10 *Cal.* 31.

97. Filing Notice.—Where the notice was served on respondent's attorney the same day that it was filed by the Clerk, and the indorsement of the filing precedes the indorsement of admission of service, the inference is that the filing preceded the service. (*Wright v. Ross*, 26 *Cal.* 262; *Blydenburgh v. Cotheal*, 4 *Comst.* 418; 5 *How. Pr.* 200; 3 *N.Y. Code R.* 216.) Where a notice of appeal is filed one day before expiration of time limited for taking an appeal, but the undertaking is not filed until three days after the expiration of that time, but within five days after filing notice of appeal: *Held*, that the appeal was taken in time. (*Peran v. Monroe*, 1 *Nev.* 484.) An appeal will be dismissed where the notice of appeal has been filed ten days after it was served. (*James v. Williams*, 31 *Cal.* 211.) Where a notice of appeal to the Circuit Court from an appraisal of lands was informally served, and afterwards filed with the clerk of the railroad company, and he was made acquainted with its contents, it was not error for the Court to refuse to dismiss the appeal on that ground. *Black v. Chicago R.R. Co.*, 18 *Wis.* 208.

98. Filing and Serving Notice.—An appeal is made by filing and serving the notice. Both requisites must exist (*Whipley v. Mills*, 9 *Cal.* 641; *Lambert v. Moore*, 1 *Nev.* 344; *Westcott v. Platt*, 1 *N.Y. Code R.* 100; *People v. Eldridge*, 7 *How. Pr.* 108) within the time prescribed by law (*Hastings v. Halleck*, 10 *Cal.* 31), to give jurisdiction to the appellate court. (*Bonds v. Hickman*, 29 *Cal.* 460; *Rooney v. Second Av. R.R. Co.*, 18 *N.Y.* 368; *Bell v. Holford*, 1 *Duer*, 58.) The omission of serving the notice of appeal on the clerk within the time limited therefor cannot be rectified. *Westcott v. Platt*, 1 *N.Y. Code R.* 100; *Morris v. Morange*, 26 *How. Pr.* 247; *Elsworth v. Ful-*

ton, 24 *Id.* 20; Trip *v.* De Bow, 3 *N.Y. Code R.* 163; People *v.* Eldridge, 7 *Id.* 108; *contra*, Crittenden *v.* Adams, 1 *Code R.* 21; 5 *Id.* 310.

99. Filing and Serving Notice.—If the notice of appeal is served on respondent's attorney, and immediately afterwards filed by the Clerk, the service and filing will be regarded as one act. (Wright *v.* Ross, 26 *Cal.* 262.) When the record shows that a notice of appeal was served on the respondent's attorney the same day that it was filed by the Clerk, and the indorsement of the filing precedes the indorsement of admission of service, the inference is that the filing preceded the service. (*Id.*) Where notice of appeal and undertaking were filed in the Clerk's office on the same day, and on the next day a copy of the notice was served on the respondent, who, within five days after filing the undertaking, excepted to the sufficiency of the sureties: *Held*, that respondent was not injured by failure to serve copy of notice on the day the undertaking was filed. *Mokelumne Hill Co. v. Woodbury*, 10 *Cal.* 185.

100. Proof of Service.—Service of notice may be proved by affidavit of a third person. (*Moore v. Besse*, *Cal. Sup. Ct., Apl. T.*, 1868.) Where such affidavits only disclose that the affiant, who was a third person, mailed a copy of the notice at Santa Cruz, directed to the respondent's attorneys at San Francisco, but did not state that the attorney for whom he acted resided at Santa Cruz: *Held*, that the affidavit was defective. (*Id.*) Affidavit of service on respondent's attorney, if it does not show a personal service, must state that the notice was left in his office, with his clerk, or with a person having charge thereof, or that no person was in the office, and that notice was left there in a conspicuous place, between the hours of eight in the morning and six o'clock in the afternoon. (*Doll v. Smith*, 32 *Cal.* 475.) Where notice has been properly served by personal or substituted service, appellant may, on motion to dismiss appeal, move for leave to supply omitted proof of service; upon leave being granted, he may file in the court below the requisite affidavit or official certificate of service, and a certified copy thereof may be annexed to the record in appellate court. (*Moore v. Besse*, *Apl. T., Cal. S. Ct.*, 1868.) An acknowledgment of service indorsed on the notice, as follows: Due service of a copy of the within notice is hereby accepted to have been made this day of, 18.., "is no waiver of an objection that service upon the day mentioned is too late." (*Towdy v. Ellis*, 22

Cal. 650.) That acknowledgment of service is sufficient proof, consult 8 *Cal.* 340; 10 *Id.* 491.

101. Service must be Made.—A failure to serve notice on the adverse party is fatal, and the appeal is a nullity. (*Whipley v. Mills*, 9 *Cal.* 641; *Wescott v. Platt*, 1 *N.Y. Code R.* 100; *People v. Eldridge*, 7 *How. Pr.* 108; *Morris v. Morange*, 17 *Abb. Pr.* 86.) And until service is made on the adverse party and the Clerk, there is no appeal in existence. Same authorities, and *Crittenden v. Adams*, 5 *How. Pr.* 310.

102. Service, how Made.—Notice of appeal taken by the people, in a criminal case, must be served on the defendant personally. (*People v. Wallace*, 23 *Cal.* 93.) It must affirmatively appear in the record that a copy of the notice has been served on the adverse party or his attorney. (*Cal. Pr. Act*, § 337; *Senter v. Bernal*, *Cal. Sup. Ct.*, Oct. T., 1869; *Franklin v. Reiner*, 8 *Cal.* 340; *Hildreth v. Gwinder*, 10 *Cal.* 490; *Western Pacific R.R. Co. v. Reed*, Jan. T., *Cal. S.C.*, 1867.) Service upon the opposite attorney is always sufficient. (*Coulter v. Stark*, 7 *Cal.* 244; *Tripp v. De Bow*, 3 *N.Y. Code R.* 163; 6 *How. Pr.* 114; *Crittenden v. Adams*, 1 *How. Pr.* 21; 5 *Id.* 110; and *N.Y. Court Rule No. 4*; *Mercer v. Pearlstone*, 7 *Abb. Pr.* 325.) And may be made by mail with its usual incidents, where otherwise admissible. (*Dorlan v. Lewis*, 7 *How. Pr.* 132; *Crittenden v. Adams*, 5 *Id.* 310.) The deposit of notice on the post office, on the last day for bringing the appeal, is in time. *Morris v. Morange*, 26 *How. Pr.* 247; 17 *Abb. Pr.* 86.

103. Service, when Made.—A copy of the notice of appeal filed must be served on the opposite party, before or at the time of filing the undertaking. (*Warner v. Holman*, 24 *Cal.* 228; *Buffendeau v. Edmondson*, 24 *Cal.* 94.) It cannot be filed and served after the undertaking is filed. *Dooling v. Moore*, 19 *Cal.* 81; *Carpentier v. Williamson*, 24 *Cal.* 609.

104. Sufficiency of Notice.—A notice of appeal from a judgment, and from all orders made in the cause, is only an appeal from a judgment. It does not sufficiently describe any order. (*Gates v. Walker*, 35 *Cal.* 289.) Even when an appeal is taken from a judgment, orders necessarily affecting it must also be appealed from in form. (*Fry v. Bennett*, 16 *How. Pr.* 385; *Hastings v. McKinley*, 3 *N.Y. Code R.* 10; *Marquhart v. Lafarge*, 5 *Duer*, 559.) A notice which

states that the appeal is taken "from all orders of the District Court made and entered in the action," is insufficient. (*Genella v. Relyea*, 32 *Cal.* 159.) A notice appealing from all orders made by a probate court, in the case, on a certain day, is sufficient. (*Estate of Pacheco*, 29 *Cal.* 224.) A notice of intention to appeal all parts of the principal case proper is a sufficient notice of intention to appeal the whole case. (*Branch v. Dick*, 14 *Ohio*, 551.) In forcible entry and detainer, a notice is not invalidated because it contains a clause that the "appeal is taken on questions of law alone." *Zoller v. McDonald*, 23 *Cal.* 136.

105. Stipulations, Effect of.—A stipulation that no execution shall issue until the determination of the appeal is not a waiver of an objection that the notice of appeal was not filed in season. (*Moulton v. Elmaker*, 30 *Cal.* 527.) If the attorneys of the parties stipulate in the transcript that notice was filed in the court below and served, the Supreme Court cannot receive evidence contradicting the stipulation. (*Bonds v. Hickman*, 29 *Cal.* 460.) The court below, upon proper application, can relieve a party from a mistake of fact in such cases. (*Id.*) Where the object of a notice of appeal is accomplished, it is immaterial whether the notice of appeal is given or not. (*McLeran v. Shartzer*, 5 *Cal.* 70.) Where both parties appear, no notice whatever is necessary to be shown. (*Id.*) An admission of due service waives all objections, even that of notice not having been given in due time. *Struver v. Ocean Ins. Co.*, 2 *Hill*. 475.

106. What to Contain.—The notice shall contain a statement of the judgment or order appealed from, or some specific part thereof. (*Cal. Pr. Act*, § 337.) It need not state the grounds of appeal, or the objections raised; (*Wilson v. Allen*, 3 *How Pr.* 369;) though it has been said it would be better practice to do so. (*Smith v. Grant*, 17 *How. Pr.* 381.) If there is enough in the notice to show that the judgment or order contained in the transcript is the same intended to be appealed from, it will not be dismissed, although it may contain mistakes as to the dates of the order or judgment. (*Flateau v. Lubeck*, 24 *Cal.* 364.) A notice stating that defendant appealed from the whole judgment is sufficient notice within the Statute. (*Price v. Van Caneghan*, 5 *Cal.* 123; *Wilson v. Allen*, 3 *How. Pr.* 372; *People v. Boylston*, 17 *Id.* 120.) The place for assignment of error is in the statement, and not in the notice of appeal. *Burnett v. Pacheco*, 27 *Cal.* 409.

*No. 1043.**Undertaking for Costs and Damages on Appeal.*

[TITLE.]

Whereas the in the above entitled action
 about to appeal to the Supreme Court of the State
 of, from a entered against
 in said action, in the said District Court, in favor of the
 in said action, on the day of,
 18.., for dollars damages, and
 dollars costs of suit, and

Now, therefore, in consideration of the premises, and
 of such appeal, we, the undersigned,, of the
 County of, and, of,
 do hereby jointly and severally undertake and promise,
 on the part of the appellant, that the said appellant will
 pay all damages and costs which may be awarded
 against on the appeal, not exceeding three
 hundred dollars, to which amount we acknowledge our-
 selves jointly and severally bound.

[DATE.]

[SIGNATURES AND SEALS.]

[Justification.]

*No. 1044.**Undertaking on Appeal Staying Execution.*

[TITLE.]

Whereas the in the above entitled action,
, appeals to the Supreme Court of the State of
, from a made and entered against
 in said action, in the said District Court, in

favor of the in said action, on the day of, 18..., for dollars damages, and dollars costs of suit, and.....:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned,, of the County of, and, of, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant desirous of staying the execution of the said so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of dollars, being double the amount named in the said, that if the said appealed from, or any part thereof, be affirmed, the appellant shall pay, the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

[SIGNATURES AND SEALS.]

[DATE.]

[Justification.]

*No. 1045.**Undertaking on Appeal in Ejectment.*

[TITLE.]

Whereas,, the in the above entitled action, has appealed to the Supreme Court of the State of, from a made and entered against in the said action, in the said District Court, in favor of the in the said action, on the . . . day of, 18., for the recovery of the possession of certain lands and premises therein described, and dollars damages for the detention thereof, and dollars costs of suit:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned,, of the County of, and, of the, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant desirous of staying the execution of the said so appealed from, as to the said costs and damages, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of dollars (being double the amount named in the said for said costs and damages), that if the said appealed from, or any part thereof

in that respect be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

And whereas the appellant desirous of staying the execution of the said so appealed from, in so far as relates to the possession of the said land and premises, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of dollars (being the amount for that purpose fixed by the Judge of this Court), that during the possession of such property by the appellant, will not commit, or suffer to be committed, any waste thereon, and that if the said appealed from be affirmed, will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, not exceeding the said sum of dollars so as aforesaid fixed by the Judge of this Court, by which the said was

[SIGNATURES AND SEALS.]

[DATE.]

[Justification.]

107. Amendments.—That the Court has power to allow an amendment to an undertaking, (*Langley v. Warner*, 1 *Comst.* 606; 3 *How. Pr.* 363; *Schermerhorn v. Anderson*, 1 *Comst.* 430; *Beach v. Southworth*, 6 *Barb.* 173; *Wilson v. Allen*, 3 *How. Pr.* 369.) As to technical defects, (*Conklin v. Dutcher*, 5 *How. Pr.* 386; *Rich v. Beekman*, 2 *N.Y. Code R.*; *People v. Tarbell*, 17 *How. Pr.* 120.) Defects in justification may by leave of Court be similarly obviated. (*Hees v. Suell*, 8 *How. Pr.* 185.) Or such defects may be supplied by allowing

the filing and service of a new undertaking, *nunc pro tunc*. (Harris v. Bennett, 3 *Code R.* 23; Mills v. Thursby (No. 8.), 11 *How. Pr.* 129; Tiers v. Carnahan, 3 *Abb. Pr.* 69; Kissam v. Marshall, 10 *Id.* 424; Staring v. Jones, 13 *How. Pr.* 423; Sternhaus v. Schmidt, 5 *Abb. Pr.* 66.) But where the defect in justification was of an essential and not of a technical nature, the application for amendments was denied. (N.Y. Cent. Ins. Co. v. National Protec. Ins. Co., 10 *How. Pr.* 344; Cushman v. Martine, 13 *How. Pr.* 402.) An undertaking cannot be amended in substance, varying the liability of the sureties without their consent. Langley v. Warner, 1 *Comst.* 606; 3 *How. Pr.* 363; Cobb v. Lackey, 6 *Duer*, 649.

108. Amount.—The amount specified must include in all cases the whole sum due upon the judgment, for principal, interest and costs, and also the sum required by Section 348 (*N.Y. Code*, § 334) to effect a stay. (Hoppock v. Cottrell, 13 *How. Pr.* 461; Newton v. Harris, 1 *N.Y. Code R.* 191.) The amount due on the judgment appealed from must be distinctly stated in the undertaking to form a ground-work for the necessary affidavit of justification. (Harris v. Bennett, 3 *C.R.* 23.) An undertaking on appeal is not invalidated because the sum mentioned exceeds three hundred dollars. (Zoller v. McDonald, 23 *Cal.* 136; *Re* Easterbrooks, 5 *Cow.* 27.) If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the undertaking shall be for such amount as the Court or the Judge thereof or the County Judge may direct. (*Cal. Pr. Act*, § 350.) And it may be for sufficient to provide for the deterioration of the property. (Read v. Potter, 11 *Abb. Pr.* 413.) In case of security, under Section 352. (*N.Y. Code*, § 338.) An application to the Court to fix the amount in which such security is to be given will be necessary in order to effect a stay. (Fireman's Ins. Co. of Albany v. Bay, 3 *How. Pr.* 424.) Where the Court neglects to fix the amount of the appeal bond, appellant may give bond in a sufficient amount. Hubble v. Renick, 21 *Ohio*, 171.

109. Consideration.—The stay of proceedings accorded by the Statute to the execution of the undertaking is a sufficient consideration. (Dore v. Covey, 13 *Cal.* 502.) Where the undertaking is pursuant to Statute it need express no consideration on its face. (Thompson v. Blanchard, 3 *Comst.* 335; Seacord v. Morgan, 17 *How. Pr.* 394.) But an undertaking not pursuant to the Statute, expressing no consideration, and not under seal, is void. Robert v. O'Donnell, 10 *Abb. Pr.* 454.

110. Costs, Payment of.—An undertaking is defective if it omit to provide in terms for payment of the costs of the appeal. (*Langley v. Warner*, 1 *Comst.* 606.) An undertaking to pay all “damages” awarded, omitting the word “costs,” is not sufficient. (*Langley v. Warner*, 1 *N.F.* 606; 3 *How. Pr.* 363; *Wilson v. Allen*, 3 *How. Pr.* 369.) An appeal will lie without a *superedeas*, upon giving security for costs. *Hudgins v. Kemp*, 18 *How. U.S.* 530.

111. Deposit in Court.—In all cases, a deposit in court of a sufficient amount shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent. *Cal. Pr. Act*, § 355.

112. Delivery.—The execution of the paper, delivery to the Clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is, *prima facie*, sufficient proof of delivery. *Dore v. Covey*, 13 *Cal.* 502.

113. Exception to Sureties.—The adverse party may except to the sufficiency of the sureties within thirty days after filing, and the opposite party has twenty days thereafter to get other sureties, or have the same justified before the Judge before whom the cause was tried or before the County Clerk. Where the appellant gave notice of the justification on a certain day, during certain hours of the day, respondent has till the last hour specified in which to appear and except. (*Lower v. Knox*, 10 *Cal.* 480.) The objection that an undertaking to stay proceedings is insufficient may be waived. (*Halsey v. Flint*, 15 *Abb. Pr.* 368.) So, failing to attend at the time and place of justification waives his objection. *Ballard v. Ballard*, 18 *N.F.* 491.

114. Filing Undertaking.—Such undertaking shall be filed, or such deposit made, with the Clerk, within five days after the notice of appeal is filed. (*Cal. Pr. Act*, §§ 348, 628; *Merced Min. Co. v. Fremont*, 7 *Cal.* 132; *Lambert v. Moore*, 1 *Nev.* 344; *Peran v. Munroe*, 1 *Nev.* 484; *Kelsey v. Campbell*, 38 *Barb.* 238; *Webster v. Stevens*, 3 *Abb. Pr.* 227; 5 *Duer*, 682; *Cushman v. Martine*, 13 *How. Pr.* 402; 6 *Duer*, 660.) And the Court has no power to extend the time. (*Elliott v. Chapman*, 15 *Cal.* 383; affirmed in *Shaw v. Randall*, *Id.* 384.) A failure to comply with the Statute will be fatal. (*Sloop “Leonede” v. United States*, *Wash. Terr.* 174; *Gordon v. Wansey*, 19 *Cal.* 821.) The provisions of a statute in regard to the time within which an act is

to be done must not be construed as directory where a consequence is attached to a failure to comply. (*Shaw v. Randall*, 15 *Cal.* 384.) The undertaking cannot be filed before the notice of appeal is filed and served. (*Dooling v. Moore*, 19 *Cal.* 81; *Carpenter v. Williamson*, 24 *Cal.* 609.) The time of filing the undertaking relates back to the time of filing and service of notice of appeal. (*Peran v. Monroe*, 1 *Nev.* 484.) By the N.Y. Code, § 334, no time is specified in which the undertaking must be filed. Parties intending to take advantage of the failure to file the requisite undertaking must do so before the case is submitted. *Cook v. Klink*, 8 *Cal.* 352; *Bryan v. Berry*, 8 *Cal.* 130.

115. Filing New Undertaking.—Where, on appearance of parties for justification, under exception to sureties, a new undertaking is filed in the place of the old one, the appeal will not be dismissed because the undertaking was not filed within five days after the notice of appeal. (*Cummins v. Scott*, 23 *Cal.* 526.) Where the appeal is *bona fide*, and not taken for delay, appellate courts will always permit a new undertaking to be filed, where the original is defective. (1 *Rand.* 462; 1 *Manf.* 397; *Coulter v. Stark*, 7 *Cal.* 244; *Bryan v. Berry*, *Id.* 130; *Cunningham v. Hopkins*, 8 *Id.* 33; *Sternhaus v. Schmidt*, 5 *Abb. Pr.* 66; *Dean v. Hemphill*, *Hempst.* 154.) In such case, on filing new undertaking, the respondent cannot require the sureties on the new undertaking to justify. *Stevenson v. Steinberg*, 32 *Cal.* 393.

116. Form.—The undertaking may be in one instrument or several, at the option of the appellant. (*Cal. Pr. Act*, § 354; *N.Y. Code*, § 340; *Englund v. Lewis*, 25 *Cal.* 356.) It is not necessary that an appeal bond conform in all respects to the form prescribed by statute. (*Foster v. Foster*, 7 *Paige*, 48; *Smith v. Normal*, 2 *N.Y. Code R.* 14.) Non-compliance with the directory provisions of the statute intended for the benefit of the respondent does not vitiate the undertaking. (*Dore v. Covey*, 13 *Cal.* 502.) A non-compliance with essentials may invalidate an undertaking. (*Chemung Canal Bank v. Judson*, 10 *How. Pr.* 133.) The omission of the words “to pay to” will not invalidate the obligation; leave should be granted to file a good bond. (*Billings v. Roadhouse*, 5 *Cal.* 71.) An undertaking given in the form of a penal bond, providing it substantially conform to all the conditions above imposed, is good. (*Conklin v. Dutcher*, 5 *How. Pr.* 386; 1 *N.Y. Code R.* 49.) Where an instrument purporting to be a bond on appeal contains words of obligation, and has a scroll opposite the name of one of the two signers who contemporaneously verify the

instrument as their bond, it is the bond of both. (*Canfield v. Bates*, 13 *Cal.* 606.) The names and residence of the sureties need not appear in the body of the paper, except in an appeal from a money judgment. (*Dore v. Covey*, 13 *Cal.* 502.) That they are usually stated, see (*Beach v. Southworth*, 6 *Barb.* 173; *Blood v. Wilder*, 6 *How. Pr.* 446.) Residence of sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions. *Dobbin v. Dollarhide*, 15 *Cal.* 375.

117. Form and Sufficiency.—Where there are two orders, but the substance of one is contained in the other, so that two orders were not necessary, only one appeal and one bond are necessary. (*Gregory v. Dodge*, 3 *Paige*, 90.) If an appeal be taken from two separate orders, two separate securities must be given. (*Schermerhorn v. Anderson*, 1 *Comst.* 430.) But where a judgment is single, only one undertaking will be requisite, though it direct the payment of different sums to different defendants. (*Smith v. Lines*, 2 *Comst.* 569; 4 *How. Pr.* 209.) If the respondents have a distinct interest in the decree, a bond should be given to each; but if their interests be joint, one bond is sufficient. (*Thompson v. Ellsworth*, 1 *Barb. Ch.* 624.) If an instrument executed and deposited with the Clerk, as required by Section 351 (*N.Y. Code*, § 337), be lost or destroyed pending the appeal, the appellant, if unsuccessful, will be bound to execute another. (*Worrall v. Mann*, 17 *N.Y.* 475.) After an appeal which is a nullity, the party may, if the time has not expired, disregard such appeal and prosecute another. *Kelsey v. Campbell*, 38 *Barb.* 238.

118. Form and Sufficiency.—"That the appellant will pay all costs and damages which may be awarded him on the appeal, and also all the rents and profits of the premises in controversy during the pendency of the appeal, not exceeding six hundred dollars," is a sufficient undertaking under this section. (*Zotler v. McDonald*, 23 *Cal.* 136.) A bond running "to the respondent, if living, and if not living, then to his executors," is not a bond to the adverse party, and will not sustain an appeal. (*Anderson v. Anderson*, 20 *Wend.* 585.) An undertaking on an appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. (*Curtis v. Richards*, 9 *Cal.* 33; *Tissop v. Darling*, *Id.* 278.) Where a bond was executed by a surety, and rejected by the Justice, and afterwards, without the knowledge of the obligor, the name of another was interlined as an obligor, who executed the bond: *Held*, that it was void as to the

first obligor. *O'Neale v. Long*, 4 *Cranch*, 60; and see *Martin v. Thomas*, 24 *How. U.S.* 315.

119. Justification of Sureties.—The sureties must justify, in California, within twenty days (§ 355), and in New York, within ten days after notice of exceptions to sureties. (*N.Y. Code*, § 341.) And such justification must be upon notice of five days upon appellant. (*Dresser v. Brooks*, 5 *How. Pr.* 75.) The time has been held to run from the filing of notice, and not from the service of copy of undertaking. (*Webster v. Stephens*, 3 *Abb. Pr.* 227; 5 *Duer*, 682.) Where, after notice of exception, the time for justification was extended, the failure of the sureties to justify within five days after notice of exception renders the appeal a nullity. (*Cal. Pr. Act*, § 355; *Roush v. Van Hagen*, 17 *Cal.* 121; *Lower v. Knox*, 10 *Cal.* 480; *Chamberlain v. Dempsey*, 13 *Abb. Pr.* 421; 22 *How. Pr.* 356; *Kelsey v. Campbell*, 14 *Abb. Pr.* 368; 38 *Barb.* 238; *Kitching v. Diehl*, 40 *Barb.* 233; *Thompson v. Blanchard*, 2 *Comst.* 561.) And it is error in the judge to make an order of *supersedeas*, staying the execution. (*Mokelumne Hill Co. v. Woodbury*, 10 *Cal.* 188.) Where respondent excepts to the sureties, they must justify before a county judge of the county where the suit is pending. (*Roush v. Van Hagen*, 18 *Cal.* 668; *Tevis v. O'Connell*, 21 *Id.* 512.) And where judgment is for more than three thousand dollars, several persons may act as sureties, and justify severally in the amount specified in the undertaking as that for which either becomes responsible. On application for justification on appeal, the merits of the appeal will not be considered. *Bradley v. Hall*, 1 *Cal.* 199.

120. Justification, Affidavit of.—Every undertaking must be accompanied by the affidavits of the sureties that each of them is worth double the amount specified therein. (*Mills v. Thursby* (No. 8), 11 *How. Pr.* 129; *People v. Tarbell*, 17 *How. Pr.* 120; *Sternhaus v. Schmidt*, 5 *Abb. Pr.* 66.) The affidavit of justification will be sufficient if it states that the sureties are each worth double the amount of the judgment, but to stay proceeding upon the judgment the sureties must also justify in double the amount necessary to cover the costs of the appeal. *Newton v. Harris*, 1 *N.Y. Code R.* 191; *Hoppock v. Cottrell*, 13 *How. Pr.* 461.

121. Liability of Sureties.—An appeal bond will be so construed as to carry out the obvious intention of the parties. (*Swain v. Graves*, 8 *Cal.* 549.) There can be no constructive parties jointly liable

with proper obligors. (*Lindsey v. Flint*, 4 *Cal.* 88.) An appeal bond signed by a firm as sureties on appeal, renders only the partner who signed the firm's name liable, unless the other partner assented. (*Charman v. McLean*, 1 *Oregon*, 339.) A right of action on an undertaking executed to stay a writ of restitution pending on appeal from a judgment in ejectment accrues upon the affirmance of the judgment, though the liability of the obligors may continue until the applicants deliver possession of the premises recovered. (*De Castro v. Clarke*, 29 *Cal.* 11.) The liability of the sureties cannot be greater than that of the principal. (*Whitney v. Allen*, 21 *Cal.* 233.) The undertaking only extends to the case of an affirmance of the judgment, and the sureties are not liable on the dismissal of the appeal. (*Watson v. Husson*, 1 *Duer*, 242; *Drummond v. Husson*, 4 *Kern.* 60; *Mills v. Forbes* (No. 12), 12 *How. Pr.* 446.) But otherwise if the dismissal be from mere neglect to prosecute the appeal. *Karth v. Light*, 15 *Cal.* 327; *Chamberlin v. Reed*, 16 *Cal.* 207; *Chase v. Beraud*, 29 *Id.* 138.

122. Liability of Sureties.—Affirmance means an affirmance by any tribunal having cognizance of the cause. (*Gardner v. Barney*, 24 *How. Pr.* 467.) The sureties upon a joint undertaking are liable, if the judgment is affirmed against one. (*Gardner v. Barney*, 24 *How. Pr.* 467.) Or if affirmed in part. (*Butt v. Stringer*, 4 *Cranch C. Ct.* 252; see *Hobart v. Hilliard*, 11 *Pick.* 143.) Under the laws of Louisiana, one who signs an appeal bond must submit to a judgment thereon in a summary way, when proceeded against on the bond. *Hiriart v. Ballon*, 7 *Pet. U.S.* 156.

123. Money Judgment.—If the appeal be from a money judgment, the execution will not be stayed unless an undertaking be executed on the part of appellant by two or more sureties, stating their residence, occupation, etc. (*Dobbins v. Dollarhide*, 15 *Cal.* 374.) And in double the amount of the judgment. The conditions of the undertaking are to pay the amount of any judgment rendered in said cause, and costs of suit, if the same is affirmed in whole, or if in a part thereof, then in whatever sum may be rendered against appellant. (Section 349, *Practice Act*; see, also, Sections 350, 351, 352, *Practice Act*, concerning appeals and undertaking thereon; *Newton v. Harris*, 8 *Barb.* 306; notwithstanding decision in *Rich v. Beekman*, 2 *N.Y. Code R.* 63.) When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and made payable in the same

kind of money or currency specified in such judgment. (*Cal. Pr. Act*, § 349; *N.Y. Code*, § 335.)

124. Notice of Exception to Sureties.—Under the Statute, notice of exception to sureties must be filed, in California, within thirty days (§ 355), and in New York, within ten days (*N.Y. Code* § 341) after the undertaking is filed. (*Young v. Colby*, 2 *N.Y. Code R.* 68.) After notice of exception to the sufficiency of the sureties on an undertaking on appeal, they cannot justify without notice to the adverse party. *Stark v. Barrett*, 15 *Cal.* 361.

125. Remedy on Defective Undertaking.—An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties, where the undertaking was both to render the appeal effectual, and to stay execution, and the justification was sufficient for the former purpose. (*Dobbins v. Dollarhide*, 15 *Cal.* 374; *Mokelumme Hill Co. v. Woodbury*, 10 *Cal.* 185.) Respondent's remedy is by motion in the court below for leave to proceed on the judgment. *Dobbins v. Dollarhide*, 15 *Cal.* 374; *Mokelumme Hill Co. v. Woodbury*, 10 *Cal.* 185.

126. Service.—A copy of the undertaking, or a notice of the deposit, must be served on the opposite party with the notice of appeal. (*N.Y. Code*, § 340.) Service of the same afterwards is void. (*Smith v. Hermance*, 18 *How. Pr.* 261; *Cushman v. Martine*, 13 *How. Pr.* 402; *N.Y. Central Ins. Co. v. National Protection Ins. Co.*, 10 *How. Pr.* 344; *Staring v. Jones*, 13 *How. Pr.* 423.)

127. Setting Aside Undertaking.—If an undertaking is defective on an appeal from judgment of sale in foreclosure, the plaintiff should move to set it aside; otherwise, if he proceed to sell the premises under the judgment, the sale must be vacated. (*Parfitt v. Warner*, 13 *Abb. Pr.* 471.) Where the undertaking substantially conforms with the requirements of the Statute, defects will be disregarded if not objected to by motion to set it aside. *Parfitt v. Warner*, 13 *Abb. Pr.* 471.

128. Stamp.—Where an appeal bond was stamped without leave of the Court, and the act not authenticated by the collector's seal, and the deputy's authority not proved, the appeal was dismissed. (*Brown v. Crandal*, 23 *Iowa*, 112.) Whether an appellant should be allowed to stamp a transcript on appeal, see *Harper v. Clark*, 17 *Ohio St.* 190; *Dunsbrow v. Johnson*, 3 *C. E. Green (N.J.)* 36.

129. Undertaking to Effect Stay.—Whenever an undertaking has been duly given and perfected, it suspends all further proceedings upon the judgment appealed from, or upon the matter embraced therein, but as regards other matter the power to proceed is not affected. (*Curtis v. Stillwell*, 32 *Barb.* 354; *Welch v. Cook*, 7 *How. Pr.* 282; see *Trustees of Pen Yan v. Forbes*, 8 *Id.* 285.) Unless an undertaking be given, the mere execution and deposit of the instrument with the Clerk will be ineffectual, and will procure no stay. (*Waring v. Ayres*, 12 *Abb. Pr.* 112.) When given, such an undertaking only stays future, and does not affect the validity of any past proceedings. Thus, where given after levy, it does not operate to discharge lien already effected, but only suspends its enforcement. *In Re Berry*, 26 *Barb.* 55; *Cook v. Dickerson*, 1 *Duer*, 679; *Rathbone v. Morris*, 9 *Abb. Pr.* 213; *Waring v. Ayres*, 12 *Abb. Pr.* 112; *Strecker v. Wakeman*, 13 *Abb. Pr.* 85.

130. Undertaking to Effect Stay.—Such stay is inchoate upon giving the undertaking, but defeasible in case sureties fail to justify if excepted to. (*Thompson v. Blanchard*, 2 *Comst.* 561; 4 *How. Pr.* 210.) Where judgment is not enforceable by execution, the ordinary security, under Section 348 (*N.Y. Code*, § 334), will effect a stay. (*Curtis v. Leavitt*, 10 *How. Pr.* 481; *Howe v. Searing*, 6 *Bosw.* 684; *Tiers v. Carnahan*, 3 *Abb. Pr.* 69.) Nor prevent perfecting the judgment. (*Curtis v. Leavit*, 19 *Barb.* 530.) Nor preclude the filing a transcript already obtained. (*Bulkeley v. Keteltas*, 3 *Sandf.* 740.) The mere taking of an appeal effects no stay. (*Story v. Duffy*, 8 *How. Pr.* 488.) It may be good for the purpose of sustaining the appeal, though wholly insufficient to stay the proceedings. (*Coithe v. Crane*, 1 *Barb. Ch.* 21.) When judgment directs a sale to satisfy a lien other than a mortgage lien, the undertaking need not provide for payment of any deficiency which the judgment may direct to be paid. (*Englund v. Lewis*, 25 *Cal.* 337.) In other cases, if there is a provision for the payment of a deficiency, the undertaking must provide for such deficiency. (*Englund v. Lewis*, 25 *Cal.* 337.) And if the undertaking is given only for costs and double the amount of the personal judgment, an execution for the sale of the property under the lien is not stayed. (*Id.*; see *Stafford v. Union Bk. of Louisiana*, 16 *How. U.S.* 135.) Nor will, in such case, a bond for costs stay the proceedings. *Orchard v. Hughes*, 1 *Wall. U.S.* 73.

131. Who Exempt from Undertaking.—The people of the

State, when appellants, need not file an undertaking on appeal. (*Laws of Cal.* 1863-4, p. 261; *People v. Clingan*, 5 *Cal.* 389.) Nor the City and County of San Francisco, in certain cases. (*Laws of Cal.* 1861, p. 350.) No undertaking on appeal is necessary when the appeal is taken by a county. (*People v. Supervisors Marin Co.*, 10 *Cal.* 344; *Warden v. Mendocino Co.*, 32 *Cal.* 655.) Nor in an appeal from the Probate Court. An executor or administrator who has given an official bond. A probate court to the Supreme Court. (*Laws of Cal.* 1855, p. 301.) Otherwise in New York. *Williamson v. Field*, 2 *Barb. Ch.* 281; see *Mills v. Forbes* (No. 12), 12 *How. Pr.* 466.

CHAPTER III.

STATEMENT ON APPEAL.

No. 1046.

Form of Statement.

[TITLE.]

COMPLAINT.

[*Insert copy of complaint or amended complaint.*]

DEMURRER.

[*Insert copy of demurrer, and order of court, sustaining or overruling the same, as the case may be, and exception to such ruling.*]

ANSWER.

[*Insert copy of answer, or amended answer, as the case may be.*]

MOTION FOR NEW TRIAL.

[*Where there has been a motion for new trial, here*

insert statement on motion for new trial, which is usually the statement on appeal.]

TESTIMONY.

[Here insert so much of the evidence as may be necessary to explain the particular errors or grounds specified.]

JUDGMENT.

[Insert copy of judgment.]

NOTICE OF APPEAL.

[Insert copy of notice of appeal.]

UNDERTAKING ON APPEAL.

[Insert copy of undertaking on appeal.]

ERRORS.

[Errors or grounds upon which the party relies on appeal.]

CERTIFICATE.

[Certificate of judge that statement has been allowed, and is correct; or certificate of attorneys that the same has been agreed to and is correct.]

STATEMENT ON APPEAL.

132. The office of the statement is to bring into the record orders and rulings, with facts necessary to explain them, which are made in all stages of the proceedings, as well as during the progress of the trial, and not contained in the judgment roll. (Abbott v. Douglass, 28 Cal. 299; De Johnson v. Sepulbeda, 5 Cal. 149; Harper v. Minor, 27 Cal. 107.) And ques-

tions not arising on the judgment roll are thus presented. (*Wetherbee v. Carroll*, 33 *Cal.* 549.) But if an appeal is taken from the judgment roll alone, no statement of grounds nor errors need be assigned, nor be contained in the transcript. (*Solomon v. Reese*, 34 *Cal.* 28; *Jones v. City of Petaluma*, 36 *Cal.* 230.) The case regularly settled and filed, and made part of the papers presented to the Court, is indispensable. *Conolly v. Conolly*, 16 *How. Pr.* 224; *Broward v. State*, 9 *Fla.* 422.

133. Non-appealable orders can be reviewed only by means of a statement on appeal from the final judgment. (*Gates v. Walker*, 35 *Cal.* 289.) Where, on appeal from an order subsequent to final judgment, objections to the consideration of certain affidavits contained in the record were not taken as required by Rule xiii. of the Supreme Court, such objections will be deemed waived, but the rule is otherwise in respect to the subject matter of a statement on appeal contained in such record, where no statement embodying the same, duly settled, certified, or agreed to, as required by law, existed in the court below. (*Wetherbee v. Carroll*, 33 *Cal.* 549; *Rogers v. Parish*, 35 *Cal.* 127.) The allegation of the omission of the Judge to settle a statement which was submitted to him cannot be taken as a substitute for a statement. *Hoadley v. Crow*, 22 *Cal.* 265.

134. To review the final decision of a referee, a case must be made containing the facts found by the referee, his conclusions of law thereon, and the exceptions of the party who appeals. (3 *Kern.* 344; *Westcott v. Thompson*, 16 *N.Y.* 613; *Wilson v. Allen*, 6

Barb. 542.) A case should present, with legal and logical precision, the questions which are to be examined, and should contain nothing else. (*Bissel v. Hamlin*, 20 *N.Y.* 519.) The questions of law and fact raised must be distinctly set forth, accompanied with only so much evidence as may be necessary to show their pertinency and materiality. (*Barrett v. Tewkesbury*, 15 *Cal.* 354; *Mokelumne Hill Co. v. Woodbury*, 10 *Cal.* 187; *People v. Comedo*, 11 *Cal.* 70; approved in *Hutton v. Reed*, 25 *Cal.* 483; *Sayre v. Smith*, 11 *Cal.* 129; *Burnett v. Pacheco*, 27 *Cal.* 408; approved in *Ryer v. Hicks*, *Oct. T.* 1865; *Hendrick v. Hitchcock*, *Jan. T.* 1867; *People v. Banvard*, 27 *Cal.* 470.) In cases of law and cases of equity alike. *Barrett v. Tewksbury*, 15 *Cal.* 354.

135. Where a judgment on a trial by the Court comes up for review without any finding of facts, nothing can be presumed against the correctness of the Judge's decision. (*Viele v. Troy and Boston R.R. Co.*, 20 *N.Y.* 184; *Carman v. Pultz*, 21 *N.Y.* 547.) The appellate court cannot look beyond the findings of fact contained in the case, in order to draw any inference of fact bearing on the appeal. (*Stewart v. Smith*, 14 *Abb. Pr.* 75.) It is essential that the finding upon the facts be explicit, and cover all the material facts in the case. *Rogers v. Beard*, 20 *How. Pr.* 282.

136. In order to review the judgment, after trial by the Court, or the decision of a referee, a statement of the facts found by the Judge, and his conclusions of law, is imperatively required. The party who prepares the case should insert the statement, which will be subject to amendment and settlement by the Judge.

If a conclusion of fact is to be reviewed, then the evidence bearing upon that conclusion, must be inserted. It will also contain the exceptions taken during the trial and those taken after trial and judgment. *Hunt v. Bloomer*, 13 *N.Y.* 341; *Magie v. Baker*, 14 *N.Y.* 435; *Johnson v. Whitlock*, 13 *N.Y.* 344; *Brewer v. Isish*, 12 *How. Pr.* 481.

137. On appeal from an order granting or refusing a new trial, a statement cannot be annexed to the order. (*Quivey v. Gambert*, 32 *Cal.* 304.) Where the appellants, in their statement on motion for a new trial, fail to specify the particulars in which the evidence is alleged to be insufficient to justify the findings, the findings of fact will not be reviewed on an appeal from an order denying a new trial. (*Cal. Pr. Act.* § 195; *Hutton v. Reed*, 25 *Cal.* 478; *Carlton v. Townsend*, 28 *Id.* 220; *Vilhac v. Biven*, 28 *Id.* 413; cited in *Spanagle v. Dellinger*, *Cal. Sup. Ct., Jul. T.*, 1869.) The following is a copy of the order of the Court in denying the application for a new trial: "Now, on this day, in open Court, comes on to be heard defendants' motion for a new trial, and thereupon, after having heard the arguments of counsel, the Court overrules the same, to which ruling of the Court defendants, by counsel, except." *Held*, that the order did not show an appearance of the counsel of the plaintiff at the argument of the motion, and, therefore, did not show a waiver of the objection to the filing of the statement. *Munch v. Williamson*, 24 *Cal.* 169.

138. "In a vast majority of cases, there would be no occasion for a motion for a new trial, if the findings were what they ought to be; for in nine cases out of

ten, where the trial is by the Court, the sole controversy here is as to whether the conclusions of law are correct. In all such cases there should be, and there certainly need be, no occasion for a motion for a new trial, or for bringing the evidence to this Court in any form. Every such case ought to come here upon the judgment roll." (*Tewksbury v. Magraff*, 33 *Cal.* 237.) A stipulation that a statement "be used on the motion for a new trial, and also on the appeal to the Supreme Court," includes an appeal both from the judgment and the order on motion for new trial. *Hastings v. Halleck*, 13 *Cal.* 203; *Godchaux v. Mulford*, 25 *Cal.* 316; *Burnett v. Pacheco*, 27 *Cal.* 409.

PREPARING STATEMENT.

139. It is sufficient, when the style of the court and title of the cause is given in the first paper, to afterward give the name of the document, and at the head say "title of cause;" and where a paper is verified or acknowledged, to say "duly verified," or "duly acknowledged." The date of the paper, date of filing, date of service, etc.—the rest may with advantage be omitted. (*Marriner v. Smith*, 27 *Cal.* 654.) When an appeal is taken from an order made upon other evidence, either alone or in connection with affidavits, documents not filed, judgment rolls and files in other cases, which are not and cannot be made a part of the files in the case heard, and questions of admissibility of evidence, etc., which may arise. So much of these as is necessary to present the legal points contested is made part of the record, by statement, and no other method is provided. *Haggin v. Clark*, 28 *Cal.* 162; see, also, *Abbott v. Douglass*, 28 *Cal.* 299; *Hutton v.*

Reed, 25 *Id.* 479; *Harper v. Minor*, 27 *Id.* 107; *Wetherbee v. Davis*, *Oct. T.*, 1867, not reported.

140. A case which refers to a paper in the judgment roll for a statement of facts and conclusions of law, and to another schedule or paper for the exceptions, is inartificial. (*Smith v. Grant*, 15 *N.Y.* 590; *Magie v. Baker*, 14 *N.Y.* 435.) Preparing cases in actions at law, in those in equity, in the practice under the New York Statute, explained; (*Lawrence v. Fowler*, 20 *How Pr.* 407.) If the appellant allows the twenty days to expire after taking the appeal without framing a case, he waives his right to have a case stated; and a subsequent order of the Court, made without notice to the respondent, allowing further time to make up the statement, is a nullity. *Leach v. Allen*, 2 *Cal.* 95; *Whitmore v. Suierick*, 3 *Nev.* 288.

WHEN STATEMENT UNNECESSARY.

141. In Nevada, in appeals from orders granting or refusing a new trial, a statement on appeal is not necessary. (*Gregory v. Frothingham*, 1 *Nev.* 253.) So from an order made on affidavits filed. (*Paine v. Linhill*, 10 *Cal.* 370; *Stone v. Stone*, 17 *Cal.* 514; *Black v. Shaw*, 20 *Id.* 68; *Walden v. Murdock*, 23 *Cal.* 540; *Haggin v. Clark*, 28 *Cal.* 162; *Gray v. Harrison*, 1 *Nev.* 502.) Nor is it necessary to specify the grounds upon which the appellant will rely for a reversal of the order of discharge in certain cases. (*Haggin v. Clark*, 28 *Cal.* 162; *Burnett v. Pacheco*, 27 *Id.* 408; *Hutton v. Reed*, 25 *Id.* 478.) The statement prepared and used on the hearing of the motion for new trial in the court below will be sufficient. *Walden v. Murdock*, 23 *Cal.* 540.

142. The affidavits must be annexed to the order in place of a statement, and the certificate of the Clerk should specify the affidavits used, which should have been marked at the time as filed on the motion. (*Paine v. Linhill*, 10 *Cal.* 370; *Stone v. Stone*, 17 *Cal.* 513.) But in other cases, if there is no statement on appeal, and no specification of errors, the appeal will be disregarded. (*Burnett v. Pacheco*, 27 *Cal.* 409.) Where there is no assignment of errors, or statement of the points and authorities on which the appellant relies, the appeal will be dismissed. *People v. Comedo*, 11 *Cal.* 70; *Id.* 129.

WHAT STATEMENT SHALL CONTAIN.

143. The statement shall state specifically the particular errors or grounds upon which he intends to rely on the appeal. (*Cal. Pr. Act*, § 338.) Error will not be presumed, but must be affirmatively shown, and all intendments are in favor of the regularity of the court below. (*Ford v. Holton*, 5 *Cal.* 319; *Todd v. Winants*, 36 *Cal.* 129; *Nosler v. Haynes*, 2 *Nev.* 53; *Champion v. Sessions*, 2 *Nev.* 272.) By an assignment of errors is meant a specification of the errors upon which appellant will rely, with such fullness as will give aid to the Court in the examination of the transcript. *Squires v. Foorman*, 10 *Cal.* 298.

144. Errors at the trial cannot be reviewed except upon a sufficient case or exceptions. (*Burnett v. Pacheco*, 27 *Cal.* 408; *Otis v. Spencer*, 16 *N.Y.* (2 *Smith*) 610; 6 *Abb. Pr.* 127; 15 *How. Pr.* 425; *Turner v. Haight*, 16 *N.Y.* 465; *Hastings v. McKinley*, 3 *N.Y. Code R.* 10.) A statement that certain action of

the court below was wrong is insufficient. (*Crisman v. Masters*, 22 *Ind.* 319.) The appellant must show wherein the error consists. (*People v. Wells*, 3 *Cal.* 148; *Ford v. Holton*, 5 *Id.* 319; approved in *Owen v. Horton*, 24 *Id.* 378; *Brown v. Tollis*, 7 *Id.* 398; *People Jocelyn*, 26 *Id.* 393; *People v. Richmond*, 29 *Id.* 414.) And failing to specify the grounds, it forms no part of the record. (*Reynolds v. Lawrence*, 15 *Id.* 359.) Errors of law, on motion for a new trial. (*Barstow v. Newman*, 34 *Id.* 90; *Loucks v. Edmondson*, 18 *Id.* 203.) From order made after judgment. (*Leffingwell v. Griffin*, 29 *Id.* 192.) Order granting nonsuit. (*Morgan v. Thrift*, 2 *Id.* 562; *Hoherstot v. Bugby*, 13 *Id.* 43.) A general objection to the form of a verdict, without any specification of the particulars, will not be considered. (*Douglas v. Kraft*, 9 *Id.* 562; *Mahoney v. Van Winkle*, 21 *Cal.* 552.) A specification of the particular grounds of error is the essential element; the evidence is the mere incident. *Id.*; *Wixon v. B. R. and Auburn Water and Mining Co.*, 24 *Cal.* 367; *Walls v. Preston*, 25 *Cal.* 59; *Millard v. Hathaway*, 27 *Cal.* 119; *Crowther v. Rowlandson*, 27 *Cal.* 376; *Moore v. Murdock*, 26 *Cal.* 524; *Burnett v. Pacheco*, 27 *Cal.* 410.

145. On the ground of error in improperly admitting evidence irrelevant to the issue, the irrelevancy must clearly appear; some facts should be adduced showing its admission had an undue influence upon the verdict of the jury. (See *Cal. Pr. Act*, § 195; *McGarrity v. Byington*, 12 *Cal.* 426; *Green v. Killey*, *Cal. Sup. Ct., Jul. T.*, 1869.) So as to the exclusion of evidence, its relevancy and the purpose for which it is offered must be stated. (*Roberts v. Unger*, 30 *Cal.* 676.) The naked direction of a court, unaccompanied by any facts,

cannot support allegations of error. (*White v. Abernathy*, 3 *Cal.* 426.) Errors assigned upon instructions will not be considered, unless there is an authenticated statement of the evidence to show the pertinency or relevancy of such instructions. *Nelson v. Mitchell*, 10 *Cal.* 92.

146. An assignment of error, that the verdict of the jury was against the law, is improper. (*Schofield v. Ferrers*, 46 *Penn. St.* 438.) An assignment of error to an answer to a point propounded on the trial below must repeat the point. (*Ditmars v. Commonwealth*, 47 *Penn. St.* 335.) An objection to evidence offered and received should be specific. *Cullum v. Wagstaff*, 48 *Penn. St.* 300.

147. The Supreme Court cannot receive evidence otherwise than through the statement or the record. (*Visher v. Webster*, 13 *Cal.* 58.) The statement shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more. (*Cal. Pr. Act*, § 338; *Hutton v. Reed*, 25 *Cal.* 478; *Haggin v. Clark*, 28 *Cal.* 162.) And so much of the evidence, rulings of the Court, etc., as may be necessary to explain the points relied on. (*Hutton v. Reed*, 25 *Cal.* 478; *Stone v. Stone*, 17 *Cal.* 513.) It is not necessary that the evidence should be in the precise words of each witness. (*Battersby v. Abbott*, 9 *Cal.* 565.) A brief synopsis of its substance is proper. (*Ross v. Roadhouse*, 36 *Cal.* 580.) And it will be presumed that the statement contains all the evidence pertinent to the motion. (*Smith v. Athern*, 34 *Cal.* 506.) A reference to the evidence as taken by the Clerk is sufficient. (*Darst v. Rush*, 14 *Cal.* 81.) Where the

statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence. *Moore v. Tice*, 22 *Cal.* 513.

148. Minutes of the Court.—The minutes of the Court, to form part of the record, must be embodied in the statement or bill of exceptions. (*Dawley v. Horrous*, 23 *Cal.* 103; *Herper v. Minor*, 27 *Cal.* 107; *Moore v. Del Valle*, 28 *Cal.* 174; *Abbott v. Douglass*, *Id.* 299; *Mendocino v. Morris*, 32 *Id.* 145; *People v. Empire G. and S. M. Co.*, 33 *Id.* 171.) And so with a mere transcript of the evidence taken down by the Clerk. (*Wilson v. Middleton*, 2 *Cal.* 54.) Instead of copying deeds and transcripts of record, where no point is made on the construction of the language, a brief statement of the instrument answers every purpose. *Knowles v. Inches*, 12 *Cal.* 212.

149. Skeleton Statement.—A statement containing the words "here insert, etc." describing writ, omitting without consent documents thus directed to be inserted in the statement as settled, will be stricken from the transcript on appeal. (*Kimball v. Semple*, 31 *Cal.* 657; see "*New Trial*," *Ante*, p. 553.) When documentary evidence is referred to in a statement on motion for a new trial, the appellant cannot, without the assent of the other party, insert copies of the same in the transcript on appeal, unless the statement has been engrossed as settled, and authenticated, or unless the originals are on the files of the Court or constitute a part of the records. (*Id.*) So much of instruments, when objected to as evidence, should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken. *Provost v. Piper*, 9 *Cal.* 552.

WRITTEN INSTRUMENTS, ETC.

150. Where a notice of motion to dismiss a complaint on specific grounds is given, to review the order made, the record must disclose the papers read, or the evidence offered in their support. (*Freeborn v. Glazier*, 10 *Cal.* 337.) No errors can be assigned on an instrument not embodied in the statement on appeal. (*Moore v. Semple*, 11 *Cal.* 360.) So, where affidavits are used

in support of a motion for new trial, the affidavits must be set forth, but the omission does not affect his right to raise the question as to errors apparent on the face of the record. (*Branger v. Chevalier*, 9 *Cal.* 353.) Where a written or printed instrument, as a newspaper "card," is rejected as evidence in the court below, such evidence or the substance of it must be returned with the record. *Dwinelle v. Henriquez*, 1 *Cal.* 387.

151. Interlocutory orders must be embodied in a statement or bill of exceptions. (*Abbott v. Douglass*, 28 *Cal.* 295.) From a decision on *habeas corpus*, the facts on which such decision was based must be presented. (*Ex parte Cleveland*, 36 *Ala.* 305.) A stipulation inserted in the transcript, and not embodied in the statement or bill of exceptions, forms no part of the record. *Ritter v. Mason*, 11 *Cal.* 214.

FILING AND SERVING STATEMENT.

152. The statement must be prepared within twenty days after the entry of the judgment or order appealed from. (*Cal. Pr. Act*, § 338.) A statement on appeal must be filed within the time prescribed by law, or the right is waived. (*Heihn v. Stransbury*, 12 *Cal.* 412; *Lafferty v. Brownlee*, 11 *Cal.* 132; *Macomber v. Chamberlain*, 8 *Cal.* 322; *Harper v. Minor*, 27 *Cal.* 107; *Ryan v. Dougherty*, 30 *Id.* 218; *Quivey v. Gambert*, 32 *Id.* 312; *McIntyre v. Willis*, 20 *Cal.* 177; *Farnsworth v. Coquillard*, 22 *Ind.* 453.) Moving for a new trial does not of itself operate to extend the time for filing a statement. *Bryan v. Maume*, 28 *Cal.* 238; *Harper v. Minor*, 27 *Cal.* 108; *Mahoney v. Caperton*, 15 *Cal.* 313.

153. If notice of appeal be regularly served and filed, but no case or exceptions be filed within the statutory time, the appeal is left upon the judgment roll. (Robinson *v.* Hudson Riv. R.R. Co., 3 *Abb. Pr.* 115; Conolly *v.* Conolly, 16 *How. Pr.* 224.) If the appealed case is submitted on briefs, and they are not filed within the time specified, and the transcript contains no assignment of errors, the judgment will be affirmed. (Hohn *v.* Roach, 25 *Cal.* 37.) In New York, a case or exceptions cannot form part of the papers on an appeal, unless filed prior to entry of judgment, or unless an order be obtained authorizing the case or exceptions to be annexed to and form part of the judgment roll. (Anderson *v.* Dickie, 26 *How. Pr.* 199.) The Court refused to remand the cause for the purpose of amending the bill; but the Court declined to decide that a new bill, with proper amendments, could not be filed. Mulford *v.* Cohn, 18 *Cal.* 42.

154. The time for preparing and filing a statement may be enlarged upon good cause shown. (*Cal. Pr. Act*, § 340.) The time for filing statement may be extended thirty days beyond the twenty days allowed by statute. (Bryan *v.* Maume, 28 *Cal.* 238.) And if more than thirty days' extension is granted, is good for the thirty days without consent of opposite party. (Bryan *v.* Maume, 28 *Cal.* 238.) Until the time or its extension, given to file a case after its settlement, has expired, the case cannot be noticed for argument. (Donahue *v.* Hicks, 21 *How. Pr.* 438.) After a statement is settled and filed, and becomes a record, it may be taken in the further progress of the action as *prima facie* evidence of the facts therein appearing. Van Bergen *v.* Ackles, 21 *How. Pr.* 314.

*No. 1047.**Notice of Settlement of Statement on Appeal.*

[TITLE.]

To, attorney for defendant:

Please take notice that the proposed statement of the plaintiff herein on his motion for new trial of this action, and the defendant's amendments to said statement, will be presented to the Judge of this Court for settlement on the day of, 18.., at o'clock A.M., at his chambers in the Court House, at, in said county.

[SIGNATURE.]

154. Amendments.—After the statement has been served on the opposite party, five days are allowed within which to prepare and serve amendments thereto. The statement and amendments which may be served shall be presented to the Judge who tried or heard the case, upon notice of two days to the respondent, and a true statement shall thereupon be settled by the Judge. If no amendments are served, then without any notice to the respondent. (*Cal. Pr. Act*, § 338.) Unless the respondent serves and files amendments within five days after service and filing of statement, he is deemed to have agreed to the statement. (*Cal. Pr. Act*, § 339; *Connor v. Morris*, 23 *Cal.* 447; *Harper v. Minor*, 27 *Cal.* 108; *Bryan v. Maume*, 28 *Id.* 238; *Kavanagh v. Mans*, *Id.* 261.) Or the Judge, without notice to the respondent, may settle and authenticate it. (*Kavanagh v. Mans*, 28 *Cal.* 261.) A party is not at liberty to serve an entire new case as an amendment, without special leave from the Court. *Stuart v. Binsse*, 4 *Bosw.* 616.

155. Authentication of Statement.—The statement, when settled by the Judge, shall be signed by him, with his certificate that the same has been allowed and is correct; or the attorneys shall sign the same with their certificate that it has been agreed upon by them, and is correct. In either case, when settled or agreed upon, it shall be filed with the Clerk. (*Cal. Pr. Act*, § 341.) The Judge, within twelve

months after the expiration of his office, may sign and settle statements and bills of exceptions on appeal. (*Laws of Cal.*, 1859, p. 220.) The certificate of a judge is a sufficient authentication (*Redman v. Gulnac*, 5 *Cal.* 148) that the statement is substantially correct. (*Battersby v. Abbott*, 9 *Cal.* 565.) But a statement certified by the judge to be correct, according to his recollection, is not sufficient. (*Van Pelt v. Settler*, 14 *Cal.* 194.) The authentication of the judge or attorneys should be indorsed on the engrossed statement. (*Kimball v. Semple*, 31 *Cal.* 657.) A judge can revoke his certificate during the term at which judgment was rendered, but after the term he cannot. (*Branger v. Chevalier*, 9 *Cal.* 172.) An authentication need not be affirmatively shown, in the absence of evidence to the contrary; the presumption of law is in favor of the regularity of all official acts. *Battersby v. Abbott*, 9 *Cal.* 565.

156. Authentication Insufficient.—An indorsement by the Judge, at the bottom of a statement made in motion for a new trial, that the amendments to the statement were allowed, is not sufficient authentication. (*Baldwin v. Ferre*, 23 *Cal.* 461.) So, a clerk's certificate that a statement is the same which was used on motion for a new trial is entitled to no weight. (*Fee v. Starr*, 13 *Cal.* 170.) But any satisfactory evidence that the statement had been used on the hearing of the motion for new trial, is sufficient authentication. (*Kidd v. Laird*, 15 *Cal.* 161.) An unauthenticated document, purporting to be a statement on motion for new trial, will be stricken from the transcript on appeal. (*Kimball v. Semple*, 31 *Cal.* 657.) And if a second statement is afterwards brought up, duly certified, but defective, the two statements cannot be used in connection. *Id.*; *Whitmore v. Shiverick*, 3 *Nev.* 288.) Where a party appears and argues a motion for a new trial, it is a waiver of want of settlement and an authentication. *Dickerson v. Van Horn*, 9 *Cal.* 207; *Williams v. Gregory*, *Id.* 76.

157. Correcting Statement.—The Supreme Court will not amend a statement by adding thereto facts which occurred in the Court below during the trial. The record in the Supreme Court must remain as settled by the Court below. (*Satterlee v. Bliss*, 36 *Cal.* 489.) The Court has power, and will amend an error in the papers transmitted on appeal. (*Lansing v. Russell*, 4 *How. Pr.* 213; *Lucas v. Baptist Church*, *Id.* 353.) A motion to correct a statement on exceptions is an original proceeding in the Supreme Court, and must be instituted by a petition in writing, which petition should be presented

with the record, and the application made before the case is submitted. (*Wormouth v. Gardner*, 35 *Cal.* 227.) Orders which the Court of Appeals has no jurisdiction to review, and the papers upon which such orders were granted, will be stricken out on motion. (*Smith v. Grant*, 15 *N.Y.* 590.) But imperfections in form should be disregarded. *Ringgold v. Haven*, 1 *Cal.* 113.

157. Engrossing Statement.—Where amendments are made to a statement, a fair copy of the statement, so amended, must be made. (*Marlow v. Marsh*, 9 *Cal.* 259; *Skillman v. Riley*, 10 *Cal.* 300; *Kimball v. Semple*, 31 *Id.* 661.) Or where deeds or documentary evidence are directed to be inserted. *Id.*

158. Objection to Statement.—The place to object to immaterial matter in a statement is where it is made up and settled. If immaterial matter is introduced, and that fact is made to appear in the records, the party insisting on its introduction will be taxed with the costs of the immaterial matter. *Kimball v. Semple*, 31 *Cal.* 657.

159. Re-Settlement.—After a case has been once settled, a re-settlement of the case, re-statement and re-finding of facts is not to be allowed. *Catlin v. Cole*, 10 *Abb. Pr.* 389; 17 *How. Pr.* 82.

160. Statement must be Made.—A party appearing must make his case and have it settled with such statement of facts as will necessarily show the law is in his favor; if not, every intendment not unreasonable in itself will be against him. (*Phelps v. McDonald*, 26 *N.Y.* 82; *Bissell v. Pierce*, 28 *N.Y.* 252.) A statement will not be regarded unless it is agreed to by the attorneys of the respective parties, or settled and authenticated by the Court. (*Hurley v. Young*, 4 *Cal.* 284; *Doyle v. Seawall*, 12 *Cal.* 425; *Fee v. Star*, 13 *Cal.* 170; *Paige v. O'Neal*, 12 *Cal.* 492; *Towdy v. Ellis*, 22 *Id.* 650; *Kavanagh v. Mans*, 28 *Cal.* 261; *Cosgrove v. Johnson*, 30 *Cal.* 509; *Burnett v. Pacheco*, 27 *Cal.* 408.) The settlement of a case is a judicial and not a ministerial act. (*Fielden v. Lahens*, 14 *Abb. Pr.* 48.) In New York, the case must be settled by the court below, and be inserted in the record, and should contain, not the evidence, but only the conclusions of fact drawn from the evidence by the court below. (*Reid v. Rensselaer Glass Factory*, 3 *Cow.* 387; *Feeter v. Heath*, 11 *Wend.* 477; *Melvin v. Leaycraft*, 17 *Id.* 169; *People v. Superior Court*, 20 *Id.* 663; *Esterly v. Cole*, 3 *N.Y.* 602; *Sturges v. Merry*, 3 *How. Pr.* 418.) Where before settlement the Judge who tried the case died, the case might be presented upon

affidavits. (*Morse v. Evans*, 6 *How. Pr.* 445.) A writ of mandate may issue to compel a judge to settle a statement made on motion for a new trial, in an insolvent case. *People v. Rosborough*, 29 *Cal.* 415.

161. Settlement, Effect of.—The Supreme Court can only look to the statement as settled by the court below, to determine the character and point of the objection made on the trial to the introduction of proposed evidence. They cannot consult the opinion of the Judge in passing upon the motion for a new trial, to discover the real point of objection. (*Cochran v. O'Keefe*, 34 *Cal.* 554.) A case as settled is deemed to contain a true statement of the facts as found. (*Hartman v. Proudfit*, 6 *Bosw.* 191.) The statement when authenticated shall be annexed to the judgment roll or order appealed from. (*Cal. Pr. Act*, § 342.) It cannot be annexed to an order denying or granting a new trial. (*Quivey v. Gambert*, 32 *Cal.* 304; *Loucks v. Edmondson*, 18 *Cal.* 203.) And when agreed on by the parties, should not probably be amended, except under a very clear showing of mistake or fraud. *Hutchinson v. Bours*, 13 *Cal.* 50.

162. Special Proceedings.—The Statute does not require the Board of Equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them, or a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal. (*Central Pacific Railroad Co. v. Placer Co.*, 32 *Cal.* 582.) In contested election cases, where the appellant assigns as error the improper rejection by the court below of the votes cast in his favor, and a statement is made part of the record, it is competent for the respondent, by way of amendment thereto, to incorporate in the statement the fact that other votes cast for him were likewise erroneously rejected by the court below. *Webster v. Byrnes*, 34 *Cal.* 273.

163. Stipulation of Attorneys.—Where counsel, in a cause pending in the Supreme Court, stipulate to submit the case to the Court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation and insist upon points other than those mentioned in the stipulation. *Cahoon v. Levy*, 10 *Cal.* 216.

164. Time for Settlement.—Statements and exceptions should be speedily settled. (*Hutchinson v. Bours*, 13 *Cal.* 50.) A case should

be presented for settlement without unnecessary delay. (*Whiting v. Kimball*, 6 *Bosw.* 690.) The bill of exceptions must be settled in time, or it will be stricken from the record. *Cameron v. Sullivan*, 15 *Wis.* 510; *Lee v. Tillottson*, 4 *Hill*, 27.

APPEAL FROM THE JUDGMENT ROLL.

166. Where there is no statement on appeal, it stands on the judgment roll. (*Karth v. Orth*, 10 *Cal.* 192; *American Riv. Wat. and Min. Co. v. Bear Riv. Wat. and Min. Co.*, 11 *Cal.* 339; *McGill v. Rainaldi*, 11 *Id.* 391; *Newberg v. Henson*, 12 *Id.* 280.) As on denial of motion for a new trial. (*Burdge v. G. H. and B. R. Water Co.*, 15 *Cal.* 198; *McIntyre v. Willis*, 20 *Cal.* 177.) And in case of a denial of motion for a new trial on the appeal from the judgment, the statement on motion for a new trial forms part of the record; (*Solomon v. Reese*, 34 *Cal.* 28; *Towdy v. Ellis*, 22 *Id.* 650; *Carpentier v. Williamson*, 25 *Id.* 154;) and may be used on appeal from the order. *Casgrave v. Howland*, 24 *Id.* 457; *Waldron v. Murdock*, 23 *Id.* 540.

167. An appeal may be taken from the judgment of the District Court without moving for a new trial in that Court. (*Innis v. The Steamer "Senator,"* 1 *Cal.* 459.) But on appeal from a judgment without a statement, nothing belongs to the record except the judgment roll, and no question arising outside of the roll can be considered. (*Wetherbee v. Carroll*, 33 *Cal.* 549.) If a judgment by default was entered on a demurrer overruled, and the judgment roll did not disclose what action was taken on the demurrer, the presumption is that the proceedings were regular. *Abadie v. Carrillo*, 32 *Cal.* 172.

168. The provisions of the Practice Act (§§ 338

to 343) shall not apply to appeals taken from an order made upon affidavit filed, but such affidavit shall be annexed to the order, in place of the statement mentioned in those sections. (*Paine v. Linhill*, 10 *Cal.* 370; *Cal. Pr. Act*, § 343.) The appeal may be heard on the record, consisting of the order appealed from, and the affidavits identified in the mode prescribed by law. (*Wetherbee v. Carroll*, 33 *Cal.* 549.) Where the evidence is not set out in a statement on appeal, the Court will presume that the court below had good reason for granting a new trial. (*Dickenson v. Van Horn*, 9 *Cal.* 207.) One who alleges error must rely on the record to disclose it. (*Waldie v. Doll*, 29 *Cal.* 555.) As error will not be presumed. *Dimick v. Campbell*, 31 *Cal.* 238; *Landers v. Bolton*, 26 *Id.* 393.

169. Every intendment is in favor of a decision of the court below. (*Id.*; *People v. Quincy*, 8 *Cal.* 89; *De Johnson v. Sepulbeda*, 5 *Cal.* 149.) But where error is shown, the presumption is that appellant has been prejudiced by it, and it is incumbent on respondent to see that the record discloses the fact that appellant has not been so prejudiced. *Norwood v. Kenfield*, 30 *Cal.* 393; *Jackson v. Feather R. Wat. Co.*, 14 *Cal.* 18.

170. Where the Court tries the cause without a jury, the proper mode of reserving questions of law is to ask the Court to decide them and note the refusal in a bill of exceptions. (*Griswold v. Sharpe*, 2 *Cal.* 17.) To make an exception available, it must appear that the precise question intended to be raised was brought to the attention of the court below. *Walsh v. Wash. Ins. Co.*, 32 *N.Y.* 427.

BILL OF EXCEPTIONS.

171. An appeal can be heard on a bill of exceptions taken at the trial, if signed by the Judge. (*De Johnson v. Sepulbeda*, 5 *Cal.* 149.) Appellant may have questions of law reviewed, by making a statement of such rulings, with sufficient evidence to show their materiality, or may embody them in a bill of exceptions. (3 *Kern.* 341, 344; *Harper v. Minor*, 27 *Cal.* 107; *Treadwell v. Davis*, 34 *Cal.* 605; *Gates v. Walker*, 35 *Cal.* 289; *Cheesebrough v. Agate*, 7 *Abb. Pr.* 32; 26 *Barb.* 603.) And only such orders and rulings as the appellant desires to have reviewed. *Harper v. Minor*, 27 *Cal.* 107.

172. The Supreme Court of Nevada has never held it indispensable that a statement should be made in the court below of the grounds relied on upon appeal. (*Gillig v. Lake Bigler Road Co.*, 2 *Nev.* 214.) The exceptions to the ruling of the court below will be treated as a substitute. (*Gillig v. Lake Bigler Road Co.*, 2 *Nev.* 214.) In the Statute, a statement and bill of exceptions on this subject mean the same thing. *People v. Lee*, 14 *Cal.* 510.

173. An appeal from the judgment only brings under review such rulings on the trial as are duly excepted to. (*Keyes v. Devlin*, 3 *E. D. Smith*, 518; *Gelston v. Hoyt*, 13 *Johns.* 561; *Coon v. Syracuse and Utica R.R. Co.*, 5 *N.Y.* 492; *Dorr v. Birge*, 8 *Barb.* 351; *Ingraham v. Baldwin*, 12 *Barb.* 9; *Hunt v. Hoboken Land Co.*, 1 *Hilt.* 161; *Franklin v. Osgood*, 14 *Johns.* 527; *Meakins v. Cromwell*, 5 *N.Y.* 136; *Tucker v. Tucker*, 1 *Id.* 408.) For the principles on which the above rule is founded, see (12 *Johns.* 493; 13

Id. 351; 17 *Id.* 469; 2 *Cow.* 31; 2 *Wend.* 146; 4 *Id.* 179; *Wood v. Young*, 5 *Wend.* 620.) Where no bill of exceptions has been filed, a judgment of the court below will not be disturbed for errors not apparent upon the record. (*Scott v. Cook*, 1 *Oregon*, 24.) Where the ruling of the Court appears on the record, a bill of exceptions is unnecessary. *People v. Maguire*, 26 *Cal.* 635; *Cunningham v. Wheatley*, 21 *Tex.* 184.

WHAT A BILL OF EXCEPTIONS SHOULD CONTAIN.

174. Documents and affidavits to be reviewed by the appellate court must be embodied in a bill of exceptions or record. (*Gates v. Buckingham*, 4 *Cal.* 286; *Ritter v. Mason*, 11 *Cal.* 214; *Moore v. Semple*, *Id.* 361.) Writings, if not embodied in a bill of exceptions, should be unmistakably marked or identified, so as to leave no doubt as to what is referred to. (*Lyons v. Thompson*, 16 *Iowa*, 62; *Garlington v. Jones*, 1 *Ala.* 196.) As affidavits in support of a motion. (*People v. Honshell*, 10 *Cal.* 83; *People v. Martin*, 32 *Id.* 92; *Harman v. State*, 22 *Ind.* 331.) Or affidavits as to incompetency of a juror. (*People v. Honshell*, 10 *Cal.* 85; affirming *People v. Stonecifer*, 6 *Cal.* 411.) Affidavits used on motion to open the judgment form no part of the record, where there is no certificate of the Clerk or admission of counsel that they were used for that purpose. *Ritter v. Mason*, 11 *Cal.* 214; *Fowler v. Harbens*, 23 *Cal.* 630.

175. And to review intermediate orders on an appeal from the final judgment, such orders must be made a part of the record by a bill of exceptions. (*Cornell v. Davis*, 16 *Wis.* 686.) An order striking out a statement on motion for a new trial cannot be brought before

the Supreme Court by a bill of exceptions. (*Quivey v. Gambert*, 32 *Cal.* 304.) It is not necessary to embody matter of record in a bill of exceptions. (*De Johnson v. Sepulbeda*, 5 *Cal.* 149.) A bill of exceptions stating "that thereupon plaintiff filed his certain motion, with affidavits attached, to set aside said verdict, does not refer to the affidavits so as to make them part of the record. (*Moffit v. Rogers*, 15 *Iowa*, 453.) If a bill of exceptions made to an order dismissing a motion for a new trial recites the giving of a notice and the different steps taken in prosecuting the motion, it will be received as evidence of the facts recited, without including notice, statement, etc., in the transcript. *Warden v. Mendocino Co.*, 32 *Cal.* 655.

FILING AND SETTLEMENT OF BILL OF EXCEPTIONS.

176. Bills of exceptions made during the progress of the trial should be written down, settled and signed by the judge, filed in the case, and be annexed to the judgment roll. (*More v. Del Valle*, 28 *Cal.* 170; *People v. Empire G. and S. M. Co.*, 33 *Cal.* 173; *Wetherbee v. Carroll*, *Id.* 553.) A bill of exceptions may be filed by the judge at his own instance, and will in such case become a part of the record. (*Shepherd v. Brenton*, 15 *Iowa*, 84.) A bill of exceptions cannot be filed by the Judge after the time given, at least not without the consent of all parties. *Swinney v. Nave*, 22 *Ind.* 178.

177. Where a bill of exceptions is without date, and the record contains no evidence that it was signed within the time required by the Statutes of Alabama, it cannot be regarded as a part of the records. (*Union*

Co. v. Mitchell, 1 *Ala.* 317.) The fact that a bill of exceptions was not signed until more than ten days after the trial cannot defeat a party's right to appeal. (People v. Martin, 6 *Cal.* 477.) A certificate of the Judge, made eight years after the trial, that he believed the exceptions were correctly noted in the Clerk's minutes of testimony, cannot supply the place of a bill of exceptions. (Castro v. Armesti, 14 *Cal.* 38.) When it appears from the bill of exceptions, signed by the Judge, that the motion for new trial was heard on statement, counter statement, and affidavits, it cannot be objected that the statement was not settled. (Williams v. Gregory, 9 *Cal.* 76.) A bill of exceptions is a part of the judgment roll. Whetherbee v. Davis.

178. Exceptions to Evidence.—An exception to admission of evidence, stating no grounds, will not be considered. (Miller v. Duff, 34 *Wis.* 167.) In a trial by the Court, the bill of exceptions must show what evidence was given on the trial, and the exceptions taken to the finding. (Concanon v. Blake, 16 *Wis.* 518.) Exceptions will not be sustained which simply show that incompetent declarations were admitted in evidence, without showing what those declarations were. (Hacket v. King, 8 *Allen (Mass.)* 144.) Objections to testimony should be preserved by bill of exceptions. (Barrett v. Jones, 21 *Ark.* 455.) A statement in a bill of exceptions, that the plaintiff offered in evidence a deed to him and others conveying the demanded premises to the parties therein named according to their respective interests, does not show whether the deed conveyed the land to the parties as tenants in common or in severalty. Page v. O'Brien, 36 *Cal.* 559.

179. Exceptions to Findings.—A special finding should be incorporated in a bill of exceptions. (Peoria Ins. Co. v. Walser, 22 *Ind.* 73.) Or an objection that the findings were improperly qualified. (Parke v. Hinds, 14 *Cal.* 415.) A defective finding of facts is not a ground for reversing a judgment, when that defect is not noticed or complained of in the court below. (McClusky v. Gerhauser, 2 *Nev.* 47.) A defective specification of grounds, explaining the points of ob-

jection, is not cured by the assignments in the exceptions taken to the findings. *Harper v. Minor*, 27 *Cal.* 107.

180. Exceptions to Instructions.—It is the duty of appellant to incorporate instruction to which he objected in his bill of exceptions. (*Hicks v. Britt*, 21 *Ark.* 422.) The instructions as asked should be for the Court, and also the modifications as made by the court below. (*Boies v. Henny*, 32 *Ill.* 130.) Exceptions to instructions given or refused by the Court should be specific. *Baker v. McGinniss*, 22 *Ind.* 157.

181. Exceptions to Rulings.—Where an exception is taken to the decision of a court refusing a nonsuit, on settlement of the bill the plaintiff must see that all the evidence material for him is inserted in the bill of exceptions. (*Ringgold v. Haven*, 1 *Cal.* 108; *Best v. Davis*, 1 *Id.* 139; *Ford v. Holton*, 5 *Id.* 321; *Dickenson v. Van Horn*, 9 *Id.* 210, 211.) A trial before a referee should be conducted in the same manner as a trial before the Court, and the evidence should be embodied in a bill of exceptions certified by the referee. (*Goodrich v. City of Marysville*, 5 *Cal.* 431; *Phelps v. Peabody*, 7 *Id.* 52.) When a bill of exceptions does not set out all the evidence, and parol testimony is so set out as to be uncertain, the Court will not review the case upon its merits. (*Rhodes v. Webb*, 34 *Wis.* 464.) In a bill of exceptions, the words "the foregoing was all the evidence given in the case," are not sufficient to exclude the presumption of other evidence. *Ford v. Mitchell*, 21 *Ind.* 54; *Estep v. Larsh*, *Id.* 183.

TRANSCRIPT ON APPEAL.

182. It is the duty of the appellant to furnish the Supreme Court with a complete, clean, properly arranged, and properly authenticated transcript. (*Kimball v. Semple*, 31 *Cal.* 657; *Spoore v. Fannen*, 16 *N.Y.* 620.) To attend to clerical and typographical errors, and see that the transcript is a true copy of the original in all respects other than maps and surveys. (*Franklin v. Goodman*, 31 *Cal.* 458.) Pleadings, proceedings, and statement shall be chronologically arranged, and each

transcript shall be prefaced with an alphabetical index to its contents. *Cal. Sup. Ct. Rule vi.*

183. It must be duly certified to be correct by the attorneys of the parties plaintiff and defendant, or by the Clerk of the Court from which the appeal is taken. (*Cal. Sup. Ct. Rule ix.*) The object of this rule is to enable the attorneys to make up the record, and by omitting useless and superfluous matter save expense, facilitate the examination, and hasten the decision. (Estate of Boyd, 25 *Cal.* 511.) The transcript of records in civil cases must be printed. As to directions, see (*Cal. Sup. Ct. Rule v.*) The party filing the transcript, or the Clerk of the Court, may print the same, and the printed transcript, certified, shall be filed, and constitute the record of the cause in the appellate court. *Cal. Sup. Ct. Rule x.*

FILING TRANSCRIPT.

182. In all cases where an appeal has been perfected, and the statement filed, if there be one, *sixty* days [see new rules which go into effect May 1st, 1870] before the commencement of the next succeeding term, the transcript shall be filed at least thirty days before the first day of such term. (*Cal. Sup. Ct. Rule ii.*) If not filed within the time prescribed, the appeal may be dismissed on motion made during the first week of the term, without notice. (*Id.*, *Rule iii.*) It has been held by the United States Supreme Court, that the general rule that transcript of record must be filed, and the case docketed at the term next succeeding the appeal, has, however, exceptions—as where appellant is prevented from seasonably obtaining the transcript, by fraud of the other party, or by the ill-founded order of

the court below. (*United States v. Gomez*, 3 *Wall. U.S.* 752; see, also, *Thompson v. Blanchard* 2 *N.Y.* 561.) Under the Statute of Iowa, it is the duty of the appellant to file a perfect transcript. *Hall v. Smith*, 15 *Iowa*, 584.

SERVICE OF TRANSCRIPT.

183. As soon as practicable after being printed, and at or before the time of filing the same, a printed copy shall be served on the attorney of the adverse party, and if there be more than one adverse party, on the attorney of each party appearing by attorney. (*Cal. Sup. Ct. Rule ix.*) A failure of such service is not a ground for dismissing the appeal, if reasonable diligence is used; but respondent may object to a hearing at the first term, if service is not made in time for him to prepare for argument. (*Estate of Boyd*, 25 *Cal.* 512.) Service should be made before or at the time of filing, and if the transcript is printed by the Clerk, the appellant should direct the Clerk to forward him copies as soon as printed, for service. *Estate of Boyd*, 25 *Cal.* 512.

184. Printed copies of the transcripts shall be furnished to each of the justices of the appellate court, the reporter, the State Library, and the attorneys of the adverse party. (*Cal. Sup. Ct. Rule x.*) See new rules of the Supreme Court of California, which go into effect May 1st, 1870, as above stated.

WHAT THE TRANSCRIPT SHOULD CONTAIN.

185. **Affidavits and Documents.**—Where the transcript contains nothing which identifies the affidavits as those upon which the motions were made, or which enables the Court to determine the cor-

rectness of the rulings, the orders cannot be brought up for review, on appeal. (*Stone v. Stone*, 17 *Cal.* 513.) Affidavits or documents copied into the transcript, but not certified by the Clerk or Judge, or not presented by statement or bill of exceptions, cannot be considered. (*Gordon v. Clark*, 22 *Cal.* 533; *Stone v. Stone*, 17 *Cal.* 513; *People v. Honshell*, 10 *Cal.* 83.) So of affidavits used on motion to open the judgment. (*Ritter v. Mason*, 11 *Cal.* 214.) Nor the affidavit of one of the attorneys, showing the objections made to the selection of the jury. *Magee v. Mok. Hill Canal and Mining Co.*, 5 *Cal.* 258.

186. Affidavits and Documents.—The certificate of the Judge, of the matters read or referred to, where documents and depositions were used on a motion for new trial, will be sufficient identification of the documents and depositions used. (*Loucks v. Edmondson*, 18 *Cal.* 203; *Walden v. Murdock*, 23 *Cal.* 549; *Polhemus v. Carpenter*, *Jan. T.*, 1862, not reported.) And a copy of such papers used on the hearing of the motion must be furnished. (Same authorities, and *Bodley v. Ferguson*, 25 *Cal.* 584.) So, on a review of an order, on motion to dismiss a complaint on specified grounds. *Freeborn v. Glazier*, 10 *Cal.* 337.

187. Affidavits and Documents.—Affidavits filed in opposition to an application for an injunction are part of the record, and may be considered, though not embraced in the statement. (*Gagliardo v. Crippin*, 22 *Cal.* 362.) An assignment of errors in case of appeal is not applicable where the case comes up with a certificate of the Clerk that the record contains "a true, correct and complete transcript of all the documents filed, of all the evidence adduced, and all the proceedings had in the suit." (*Kearney v. Nixon*, 17 *La. An.* 318.) When the record contains a bill of exceptions, although the Clerk does not certify that the record contains all the evidence adduced, an appeal can be maintained. *Martin v. Blanchin*, 16 *La. An.* 83.

188. Copy of Map.—The appellate court does not examine the original transcript in the Clerk's office, unless it contains the only copy of a map or survey. (*Franklin v. Goodman*, 31 *Cal.* 458.) But one copy of any map or survey need be furnished. *Cal. Sup. Ct. Rule vii.*

189. Findings.—Where a cause is tried by a judge alone, the record should disclose a finding by him of the facts, and a statement of his conclusions of law upon the facts. (*Hoagland v. Clary*, 2 *Cal.* 474.)

No findings are now necessary, unless demanded at the time of rendering the decision.

190. Judgment Roll.—If the transcript does not contain all the the judgment roll, but contains all that is necessary, the defect is waived by stipulation that it contains all that is necessary for the purpose of the appeal. (*Solomon v. Reese*, 34 *Cal.* 28.) But the transcript should always contain enough of the record of the court below to fully present the question, and show the materiality of the point relied on to reverse the judgment or order; and generally, whenever a pleading or other paper has been necessarily used on the hearing of the court below, a copy of the pleading or an agreed statement of the contents of so much, at least, as is relevant to the point in issue, should be furnished in the transcript. (*McQuade v. Whaley*, 29 *Cal.* 614.) The fact that a record is erroneous in stating that the parties waived a jury cannot be shown by an affidavit of the judge who tried the cause. *Smith v. Brannan*, 13 *Cal.* 115.

191. Motions.—A motion is no part of a record, and its indorsement by the Judge as "correct," does not make it so. *Thompson v. Buckenstos*, 1 *Oregon*, 17.

192. New Trial.—On appeal from an order denying a new trial, the appellant is only required to furnish copies of the notice of appeal, order appealed from, and of the papers used on the hearing of the motion. (*Wakeman v. Coleman*, 28 *Cal.* 58.) Subsequent decisions seem, however, to require more. Evidence of service of the notice of motion must be contained in the record, or it must clearly appear that service was waived. (*Calderwood v. Brooks*, *Id.* 151.) The transcript must also contain an authenticated copy of the pleadings, or an agreed statement of their contents. (*McQuade v. Whaley*, 29 *Cal.* 612.) Or such pleadings, depositions and minutes as were read or referred to on the hearing, identified by the certificate of the Judge. (*Wetherbee v. Carroll*, 33 *Cal.* 549.) And the affidavits and statement upon which the motion was made. (*Wetherbee v. Carroll*, 33 *Cal.* 549.) There is no necessity of preparing a statement on appeal, the statement on motion for new trial being sufficient. (*Loucks v. Edmondson*, 18 *Cal.* 203.) It is not necessary, in all cases, to bring up the proceedings in full. A summary will, in most cases, answer every purpose on appeal, if it be agreed to by the attorneys of the parties. (*Todd v. Winants*, 36 *Cal.* 129.) When the only point is as to whether the statement was

filed in time, it is not necessary to insert the statement itself on the record. *Harper v. Minor*, 27 *Cal.* 109.

193. New Trial.—If a new trial has been denied, on the ground that the evidence is insufficient to sustain the cause of action, an authenticated copy or an agreed statement of the pleadings must be included in the transcript. (*McQuade v. Whaley*, 29 *Cal.* 612; *Wetherbee v. Carroll*, 33 *Cal.* 549.) An appellate court will not consider an order on motion for a new trial, when the motion, judgment, and pleadings are only presented to it by a bill of exceptions. (*N. O. R.R. Co. v. Albritton*, 38 *Miss.* 242.) An appeal was taken from a judgment of nonsuit, and an order denying a motion for a new trial. The transcript on appeal consisted of the statement on motion for a new trial, and a stipulation that said motion was denied, that the appeal was duly taken and perfected, and “that the foregoing transcript is correct.” *Held*, that in the absence of the pleadings, or a statement of the issues, this Court cannot ascertain whether the court below erred in granting the nonsuit, and the judgment will be affirmed. *Todd v. Winants*, 36 *Cal.* 129.

194. Notice of Appeal.—The transcript must show that notice of appeal has been duly served upon the other side. *Franklin v. Renier*, 8 *Cal.* 340; *Western Pacific R.R. Co. v. Reed*, 35 *Cal.* 621; *Carr v. State*, 1 *Kans.* 331.

195. Order after Judgment.—On an appeal from an order after judgment, the transcript should contain a copy of the order appealed from, and copies of all papers used on the hearing. (*Glidden v. Packard*, 28 *Cal.* 649.) And if based on affidavits and other evidence, it must contain a statement made and settled in the mode prescribed for the making and settling statements on appeals from final judgments. *Wetherbee v. Carroll*, 33 *Cal.* 549.

196. Order Based on Evidence.—When an appeal is from an order based on evidence other than affidavits, the record consists of the order appealed from and a statement prepared and settled, containing so much of said evidence as is necessary to present the points relied on. (*Wetherbee v. Carroll*, 33 *Cal.* 549.) The appellate court cannot reverse a judgment for want of sufficient evidence to sustain the verdict, unless the record shows that all the material evidence is before it. *State v. Bonds*, 2 *Nev.* 265.

197. Pleadings.—On an appeal from a final judgment, the tran-

script must contain a copy of the pleadings. (*Cal. Pr. Act*, § 346; *Hart v. Plum*, 14 *Cal.* 148.) Attorneys may agree as to the contents of the pleadings, and introduce into the transcript such agreement, instead of printing the entire pleadings. [This course should be pursued in all cases where no point is made on them.] (*McQuade v. Whaley*, 29 *Cal.* 612.) But if an amended complaint or answer is filed, and no question arises on the original pleadings, it is not necessary to include them in the transcript. (*Marriner v. Smith*, 27 *Cal.* 649.) A statement of the contents of pleadings not agreed to by the opposite attorney, or included in the settled statement, though placed in the transcript, constitutes no part of the record. *McQuade v. Whaley*, 29 *Cal.* 612.

198. Separate Appeals.—When defendants take separate appeals, and sign distinct bonds, one transcript will suffice. (*Baham v. Langfield*, 16 *La. An.* 156.) Where one of the parties in an action appeals, and another party in the same action takes another and independent appeal, neither party, in the appellate court, can refer to the transcript in the other appeal for the facts, without a stipulation to that effect. Each appeal must be heard on its own record. *Gates v. Walker*, 35 *Cal.* 289.

189. Statement.—Where the transcript does not contain any statement or grounds of appeal, and no assignments of errors or brief are filed, the appeal will be dismissed. (*Fowler v. Harbin*, 23 *Cal.* 630; *Hoadley v. Crow*, 22 *Cal.* 265.) No portion of a statement can be omitted, except on stipulation of the other party. (*Kimball v. Semple*, 31 *Cal.* 657.) Where a copy of an order, certified by the Clerk, sustaining a demurrer to a replication, together with the judgment roll, were filed, but there was no statement or bill of exceptions, the action of the court below on the demurrer could not be reviewed. *Bostwick v. McCorkle*, 22 *Cal.* 669.]

190. Stipulations.—A stipulation signed by the attorneys of the parties, that “the foregoing transcript is correct,” does no more than take the place of the Clerk’s certificate that the papers to which it is annexed are true copies. (*Todd v. Winants*, 36 *Cal.* 129.) It does not preclude respondents from denying correctness or sufficiency of bill of exceptions. (*Wetherbee v. Carroll*, 33 *Cal.* 549.) Where there is in the transcript a stipulation by the parties that “the plaintiff duly excepted” to the “charges and each part thereof,” it will be construed as a stipulation that the exceptions were sufficiently specified to render them available. *Bowman v. Cudworth*, 31 *Cal.* 148.

191. Undertaking.—The appellant must show that the required undertaking on appeal has been given. (*Bryan v. Berry*, 8 *Cal.* 130; *Wakeman v. Coleman*, 28 *Cal.* 58.) Either by introducing a copy of the undertaking; (*Wakeman v. Coleman*, 28 *Cal.* 58;) or by stating that an undertaking in due form was filed within the time prescribed. (*Wakeman v. Coleman*, 28 *Cal.* 58; *Franklin v. Reiner*, 8 *Cal.* 340.) Or by certificate of the Clerk that the undertaking has been filed, and the time of filing the same. *Bryan v. Berry*, 8 *Cal.* 130.

WHAT TRANSCRIPT SHOULD NOT CONTAIN.

191. Nothing is included in the record of a suit but the judgment roll. (*Sharp v. Daugney*, 33 *Cal.* 505.) Such parts of the judgment roll as are of no use for the purposes of the appeal should be omitted. (*Solomon v. Reese*, 34 *Cal.* 28.) Or such matters as do not tend in some degree to illustrate the points made on appeal. (*Estate of Boyd*, 25 *Cal.* 511.) A judgment in another case, which is not made part of the complaint or answer by averment, and was not one of the papers on the hearing of motion to grant or dissolve an injunction, though printed in the transcript, is no part of the record. *Sanchez v. Carriaga*, 31 *Cal.* 170.

192. When an appeal is taken on the judgment roll alone, and no statements made, a specification of grounds of error is not required to be inserted in the transcript. (*Hutton v. Reed*, 25 *Cal.* 483.) A party cannot incorporate in his transcript *ex parte* affidavits impeaching the statement, and, after the final submission of the case, bring the question before the Supreme Court for the first time in his brief. *Wormouth v. Gardner*, 35 *Cal.* 227.

HEARING ON APPEAL.

193. After the record is fully made up and printed, and certified to by the County Clerk of the proper County, or by the attorneys, it is called the transcript, and upon a deposit of twenty-five dollars with the Clerk of the Supreme Court, it is filed, and the case goes regularly on the calendar of that Court, and is called in its order at the next term thereafter. Generally the causes in the Supreme Court are submitted on briefs, and it is deemed the better practice to do so, unless the case involve some new or important principle, and even then an oral argument, however able or convincing, is necessarily forgotten before the case is taken up to be decided by the Court, as months often elapse before it can be reached in its order. To understand the practice in the Supreme Court of our own State, as well as of the highest courts in any of the other States, a full knowledge of the rules of such courts must be acquired. This is especially important in the practice in the United States District, Circuit, and Supreme Courts.

194. Where no briefs are filed within the time specified, when the cause is submitted on briefs to be filed, and the transcript contains no assignment of error, judgment will be affirmed. (*Hutton v. Reed*, 25 *Cal.* 483; *Holm v. Roach*, 25 *Cal.* 37; *Edmondson v. Alameda Co.*, 24 *Cal.* 349; *Hickinbotham v. Monroe*, 28 *Id.* 489.) As to the time of filing briefs and the practice thereon, consult (*Cal. Sup. Ct. Rule ii.*) If the appellant insists in his brief that the respondent must recover the whole amount sued for or nothing, the Court will

not decide whether the judgment was entered for a proper sum. (*Moore v. Murdock*, 26 *Cal.* 514.) While the uncontradicted statements of counsel in his brief cannot be taken as part of the record, still they may be referred to as tending to show that the inference drawn from a record is not unfounded. *Hood v. Hamilton*, 33 *Cal.* 698.

195. Points should be made by appellant in his opening brief. (*Hihn v. Courtis*, 31 *Cal.* 398; *Kelly v. McCormick*, 28 *N.Y.* 318.) And if not made within the time prescribed, the judgment will be affirmed. (*Hickinbotham v. Monroe*, 28 *Cal.* 489; *Glass v. McAllister*, 31 *N.Y.* 50; *Kelly v. McCormick*, 28 *N.Y.* 318.) The points of counsel should be consistent with each other. Counsel cannot claim there was a bill of sale, and then insist that the bill of sale was void. *Patterson v. Keystone Min. Co.*, 30 *Cal.* 360.

ERRORS IN THE RECORD, HOW AMENDED.

196. Errors in dates, in copies of documents, in the description of premises taken for conveyances, and the like, can be corrected by a re-settlement; and upon proper showing, made before argument, the Supreme Court may send the record back to the court below for that purpose. So, where the errors are admitted. (*People v. Romero*, 18 *Cal.* 89.) And irrelevant portions of the case may be stricken out, or matter improperly inserted. (*Smith v. Grant*, 15 *N.Y.* 590; *Brown v. Saratoga R.R. Co.*, 18 *N.Y.* 495.) But the Supreme Court cannot amend a complaint so as to make it correspond with the verdict. (*Hooper v. Wells*, 27 *Cal.* 311.) Motion for amendment after return filed should

be made to the Court of Appeals in the first instance. (*Adams v. Bush* (No. 3), 2 *Abb. Pr.* 118.) But a mere clerical error in a judgment, not affecting the appellant, can be corrected, and is not ground for reversal. *Anderson v. Parker*, 6 *Cal.* 197.

197. If no motion is made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at appellant's costs. (*Tryon v. Sutton*, 13 *Cal.* 490.) The appellate court may order a document to be inserted in or stricken from the transcript in order to perfect it, but it cannot amend the document itself. *Bonds v. Hickman*, 29 *Cal.* 460.

ARGUMENT OF COUNSEL.

190. No more than two counsels on a side will be heard upon the argument, except in peculiar and important cases. (*Cal. Sup. Ct. Rule* xviii.) The counsel for the appellant shall be entitled to open and close the argument. (*Cal. Sup. Ct. Rule* xviii.; *Benham v. Rowe*, 2 *Cal.* 387.) Arguments will be heard only four days during each week of the term. *Cal. Sup. Ct. Rule* xxxv.; but see new rules.

199. The appellant is confined in his argument to the objections urged in the court below. *Clarke v. Huber*, 25 *Cal.* 593; *Edgerton v. Thomas*, 5 *Seld.* 40; *Belknap v. Seeley*, 4 *Kern.* 143; *Durgin v. Ireland*, *Id.* 322; *Codd v. Rathbone*, 19 *N.Y.* 37; *Savage v. Cook*, 17 *Abb. Pr.* 403; *Stewart v. Smith*, 14 *Abb. Pr.* 75.

200. The respondent may suggest any ground to show that the ruling of the court below was right,

whether the grounds suggested were advanced in the court below or not. (*Clark v. Huber*, 35 *Cal.* 593.) Or he may insist on a point properly presented, although it was not urged in the trial of the cause. (*Kidd v. Temple*, 22 *Id.* 255.) When counsel assume a certain principle advanced as correct law, and the Court decides the case upon this assumption, without discussing its correctness, the opinion is not authority that such assumption is correct law. *Downer v. Palmer*, 31 *Id.* 500.

OBJECTIONS TO THE TRANSCRIPT.

201. Exceptions or objections to the transcript, or statement, the bond or undertaking on appeal, the notice of appeal or its service, or any technical objection or exception to the record, affecting the right of the appellant to be heard on the points of error assigned, must be taken, and noted in the printed points of respondent required to be filed and served under the rules of the Supreme Court. (*Cal. Sup. Ct. Rule* xiii.) So of the objection that it does not contain all that is required by Section 346 of the California Practice Act. *Solomon v. Reese*, 34 *Cal.* 28.

202. The objection that it does not appear in the transcript when the statement or motion for new trial was filed in the court below, must be made in the Supreme Court, before a submission of the case on the merits, or it will be deemed waived. (*Ross v. Roadhouse*, 35 *Cal.* 580.) If a case is submitted on its merits by consent of counsel, the submission, even if made before the day the case is set for argument, is a waiver of technical objections to the transcript. *St. John v. Kidd*, 26 *Id.* 263.

203. If the transcript cannot be made out, by reason of the loss of a portion of the records of the case, it is the duty of the appellant to move the court below, at the earliest possible time, to supply the lost papers by some means under its control. (*Buckman v. Whitney*, 24 *Cal.* 267.) By copies from the original. (*Id.*; Same Case, 28 *Id.* 555.) That the transcript of a record in a case on appeal is incomplete cannot be shown by certificate of the Clerk. The "Grapeshot," 7 *Wall. U.S.* 563.

204. In case of a stipulation of attorneys, that "the foregoing transcript is correct," the respondent's objections to the sufficiency of the transcript are not waived by his failing to take exception thereto, according to Rule xiii. of this Court. (*Todd v. Winants*, 36 *Cal.* 129.) On an appeal from a judgment by default against a non-resident, an objection that the record does not contain the affidavit on which an attachment in the suit issued is not well taken. (*Dow v. Whitman*, 36 *Ala.* 604.) If a part of the judgment appealed from is omitted in the record, the Supreme Court may require it to be supplied on the suggestion of the diminution of the record. *McGarrahan v. Maxwell*, 28 *Cal.* 75.

205. Or the appellant may suggest a diminution of the record, and obtain an order directing the clerk of the court below to certify a copy of the undertaking not shown by the transcript to have been filed. (*Wakeman v. Coleman*, 28 *Cal.* 58.) The fact that the record is erroneous cannot be shown by an affidavit of the judge who tried the cause. (*Smith v. Brannan*, 13 *Id.* 107.) As to the practice in correcting errors or defects in the transcript, see (*Cal. Sup. Ct. Rule* xii.; see *Mc-*

Gregor *v.* Comstock, 19 *N.Y.* 581.) It will require a strong showing to justify the Court, to permit additions to the transcript, of matters before deliberately omitted. (Ketchum *v.* Crippen, 31 *Cal.* 365.) The Supreme Court has no authority to correct the records in the lower courts. Applications to correct errors in the records of district courts, if any exist, must be made in lower courts. Boston *v.* Haynes, 31 *Id.* 107.

206. Where there is a substantial defect in the appeal, the objection may be taken at any time before judgment. (8 *Pet.* 526; 7 *Pet.* 399; Wilson *v.* Life and Fire Ins. Co., 12 *Pet. U.S.* 140.) If the defect of jurisdiction appear on the transcript, it cannot be cured by amendment, as consent of parties will not confer jurisdiction in appeal. (19 *How. U.S.* 200; Montgomery *v.* Anderson, 21 *How. U.S.* 286; Ballance *v.* Forsyth, *Id.* 389.) But when a case is brought up on appeal for the second time, it is too late to object that the Court had not jurisdiction to try the first appeal. Washington Bridge Co. *v.* Stewart, 3 *How. U.S.* 413; Sizer *v.* Many, 16 *Id.* 98; Himley *v.* Rose, 5 *Cranch*, 313; Boyce *v.* Grundy, 9 *Pet.* 290; compare The "Santa Maria," 10 *Wheat.* 431.

DISMISSAL OF APPEAL.

207. If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed, on motion during the first week of the term, without notice, and the production and offer to file the record shall not be a sufficient answer to such motion, and unless the cause be restored during the same term the dismissal shall be final. (*Cal. Sup. Ct. Rule* iii.) For proceedings on motion to dismiss, consult (*Cal. Sup.*

Ct. Rule iv.) An appeal will be dismissed in certain cases where documents offered in evidence below are not found in the record. (*Hall v. Beggs*, 17 *La. An.* 30.) Or for want of assignment of errors. (*Brooks v. Townsend*, 4 *Cal.* 285.) But if the order of dismissal is procured by any fraud or imposition practiced on the Court or the opposite party, the Supreme Court will recall the *remittitur*, stay the proceedings, and assert its jurisdiction, even after the adjournment of the term. *Rowland v. Kreyenhagen*, 24 *Cal.* 52; *Martinez v. Gallardo*, 5 *Cal.* 155.

208. No appeal shall be dismissed for insufficiency of the notice of appeal or undertaking thereon, provided that a good and sufficient undertaking, approved by a judge of the Supreme Court, be filed in the Supreme Court before the hearing, upon motion to dismiss the appeal, and upon the payment of such reasonable costs as the Court may adjudge; provided, that the respondent shall not be delayed, but may move when the cause is regularly called for the deposition or dismissal of the same, if such undertaking be not given. (*Laws of Cal.*, 1361, p. 589.) So, in case the filing of notice of appeal did not precede the filing of the undertaking on appeal. (*Dooling v. Moore*, 19 *Cal.* 81.) Or because the undertaking was not filed within five days after notice of appeal filed. *Gordon v. Wansey*, 19 *Cal.* 82.

209. Where the appellant's appeal has been imperfectly made or settled, it will be, on motion, dismissed. (*Livingston & Radcliff*, 2 *Comst.* 189; *Sturgis v. Merry*, 2 *Comst.* 189; *King v. Dennis*, *Id.* 189; *Colie v. Brown*, 1 *N.Y. Code R.* 416; *Hunt v. Bloomer*, 3 *Kern*, 341; *Johnson v. Whitlock*, *Id.* 344; *Zabriskie v. Smith*, 1 *Id.*

480.) Or where the appeal is defective for want of jurisdiction. (*Pugsley v. Kesselbergh*, 6 *Seld*, 420; *Wiggins v. Tallmadge*, 7 *How. Pr.* 404; *Lalliette v. Van Keuren*, *Id.* 409.) Or where the order or decree appealed from is unappealable. (*Smith v. White*, 23 *N.Y.* 572; *Moore v. Westervelt*, 1 *N.Y. Code R.* 415; *Wait v. Van Allen*, 22 *N.Y.* 319; *Genin v. Thompson*, 1 *N.Y. Code R.* 415; *Ely v. Holton*, 15 *N.Y.* 595; *McAllister v. Albion Plank R. Co.*, 6 *Seld*, 353; *Matter of Canal and Walker Sts.*, 2 *Kern.* 406; *N.Y. Cent. R.R. Co. v. Marvin*, 1 *Id.* 276; *Adams v. Fox*, 27 *N.Y.* 640; *Wiggins v. Tallmadge*, 7 *How. Pr.* 404; *Lahens v. Fielden*, 15 *Abb. Pr.* 177.) Or where the appeal is brought too late, or prematurely. (*B'k of Geneva v. Hotchkiss*, 5 *How. Pr.* 478; *Wells v. Danforth*, 7 *How. Pr.* 197; *Woolen Manf. Co. v. Townsend*, 1 *N.Y. Code R.* 415; *McMahon v. Harrison*, 5 *How. Pr.* 360; *Mills v. Shult*, 2 *E. D. Smith*, 139.) Or where no regular case is presented. *Westcott v. Thompson*, 16 *N.Y.* 613; *Hunt v. Bloomer*, 13 *N.Y.* 341; *Johnson v. Whitlock*, 13 *N.Y.* 344; *Otis v. Spencer*, *supra*; *Ingersoll v. Bostwick*, 22 *N.Y.* 425.

210. Where an appeal originally good is lost by the change in the law, it will be dismissed on motion. (*Gale v. Wells*, 7 *How. Pr.* 191; *Porter v. Jones*, *Id.* 192.) Or where an appeal is brought in bad faith, or in violation of a stipulation. (*Townsend v. Masterson Stone Dressing Co.*, 15 *N.Y.* 587.) Or where, pending the appeal, the controversy had been settled. (*Shank v. Shoemaker*, 18 *N.Y.* 489; *Smith v. Hart*, 11 *How. Pr.* 203.) Or where, by enforcement of a portion of the judgment, appellant had waived his right to appeal. (*Bennett v. Van Syckel*, 18 *N.Y.* 481.) Or

where appellant has no right to appeal at all. (Matter of Bristol, 16 *Abb. Pr.* 397.) But that appellant has no interest in the subject matter of the suit is no ground for dismissal, even on a second appeal after judgment reversed. *Ricketson v. Compton*, 23 *Cal.* 635.

211. In case of a second appeal, where the costs of the first appeal have not been paid, appeal will be dismissed. (*Dresser v. Brooks*, 5 *How. Pr.* 75.) Or where the appellant does not furnish the papers necessary to inform the Court of the nature of the appeal. (*Sun Mut. Ins. Co. v. Dwight*, 1 *Hill.* 50.) Or where the appeal book, in any way, fails to show matters which the Court can review. *Westcott v. Thompson*, 16 *N.Y.* 613; *Livingston v. Radcliffe*, 2 *N.Y.* 189; *Sturgis v. Merry*, *Id.* 190; *King v. Dennis*, *Id.* 191; *Lahens v. Fielden*, 15 *Abb. Pr.* 177.) As from want of exceptions. *Hunt v. Bloomer*, 13 *N.Y.* 341; *Colie v. Brown*, *N.Y. Code R.* 416; *Cheesebrough v. Agate*, 26 *Barb.* 603; 7 *Abb. Pr.* 32.

212. Where appellant has failed to file a transcript of the record showing that an appeal has been perfected, appeal will be dismissed, with ten per cent. costs. (*Pacheco v. Bernal*, 2 *Cal.* 150; *Buckley v. Stebbins*, 2 *Cal.* 849.) Fifteen per cent. awarded in (*De Witt v. Porter*, 13 *Cal.* 171.) Twenty per cent. in (*Nickerson v. Cal. Stage Co.*, 10 *Cal.* 520.) On an appeal from an order denying a new trial, appellant failing to furnish Supreme Court with a copy of the papers used on hearing the motion, appeal will be dismissed on motion. *Bodley v. Ferguson*, 25 *Cal.* 584.

213. On motion to dismiss an appeal, on the ground

that an undertaking on appeal is not shown in the transcript, appellant may suggest a diminution of the record, and obtain an order directing the Clerk of the court below to certify a copy of the undertaking to the appellate court. (*Wakeman v. Coleman*, 28 *Cal.* 58; *Gordon v. Wansey*, 19 *Cal.* 82.) Where the undertaking is sufficient to render the appeal effectual, but is not sufficient to operate as a stay, respondent may move for leave to proceed in the judgment, but not to dismiss the appeal. (*Dobbins v. Dollarhide*, 15 *Cal.* 374.) Where an appeal has been dismissed for want of a proper bond, and no final judgment rendered, a second appeal can be taken. *Martinez v. Gallardo*, 5 *Cal.* 155.

214. A motion to dismiss an appeal, on the ground that the transcript was not filed within the time required by the California Superior Court Rules, is too late after the case has been submitted. (*Cook v. Klink*, 8 *Cal.* 347.) A dismissal of an appeal, from failure to file the record within the time required, is not an affirmance of the judgment. (*United States v. Gomez*, 23 *How U.S.* 326.) If the appellant neglects to file a brief within the time fixed, and the transcript contains no assignment of errors, except the general one that the order or judgment appealed from is not warranted by the evidence, the appeal, on motion, will be dismissed. *Williams v. Hall*, 24 *Cal.* 155.

315. An appeal will be dismissed if a copy of the notice of appeal is served before the day on which the original is filed. (*Buffendeau v. Edmondson*, 24 *Cal.* 94.) On an appeal from decrees in two causes relating to matters which should be adjusted in one suit, the Court remitted one bill and dismissed the other. (*Wing*

v. Huntington, *Seld. Notes*, No. 5, 38.) Where a party appeals from a judgment after it has been vacated and set aside by an order granting a new trial, the appeal will be dismissed. *Dowling v. Moore*, 19 *Cal.* 81.

216. Where it was apparent that the appeal was taken simply for delay, five per cent. upon the judgment was awarded to respondent as damages. (*Lehane v. Keys*, 2 *Nev.* 361.) Though mere delay is no ground for dismissal on appeal. (*Dey v. Walton*, 2 *Hill*, 403.) Nor that an appeal is sham and frivolous. (*Ricketson v. Compton*, 23 *Cal.* 636; *Dey v. Walton*, 2 *Hill*. 403; *Rogers v. Hoosack*, 5 *Id.* 521.) Appeal will not be dismissed for clerical errors in the record. (*Adams v. Law*, 16 *How. U.S.* 144.) Nor because the security was not sufficient to entitle the party to a *supersedeas*. (*Hudgins v. Kemp*, 18 *How. U.S.* 530; *Anson v. Blue Ridge R.R. Co.*, 23 *Id.* 1.) But if the appellant has become possessed of all the appellee's interest, appeal will be dismissed. *Cleveland v. Chamberlain*, 1 *Black.* 419.

217. A motion to dismiss an appeal may be made by either party. (*Lanman v. Lewiston R.R. Co.*, 18 *N.Y.* 493; *Porter v. Jones*, 7 *How. Pr.* 192; *Warren v. Eddy*, 13 *Abb. Pr.* 28; 32 *Barb.* 664.) But an order obtained by appellant is imperative until costs thereby imposed are paid. *Burnet v. Harkness*, 4 *How. Pr.* 158.

DISMISSAL, EFFECT OF.

218. Dismissal for want of prosecution operates as an affirmance of the judgment, within the Statute relative to undertakings on appeal, unless the order of dis-

missal be vacated during the term. (*Karth v. Light*, 15 *Cal.* 324; *Rowland v. Kreyenhagen*, 24 *Id.* 52; *Chamberlin v. Reed*, 16 *Id.* 207.) Or where the dismissal is on the merits. (*Karth v. Light*, 15 *Cal.* 324.) Where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like, it is not a bar. (*Karth v. Light*, 15 *Cal.* 324.) It has been held that after the dismissal of an appeal, the appellate court loses all jurisdiction in the case. It stands in the same situation it did before the appeal was prayed. *Maxwell v. Williams*, *Hempst.* 172.

REINSTATEMENT.

219. When an appeal has been dismissed, the appellate court may, upon good cause shown, reinstate it upon motion. (The "*Palmyra*," 12 *Wheat.* 1; *Bank of U.S. v. Swan*, 3 *Pet. U.S.* 68.) But if dismissed for want of jurisdiction as to amount in controversy, affidavits of its value come too late. (*Richmond v. City of Milwaukie*, 21 *How. U.S.* 391.) In appeals, no other or different issues than those upon which judgment was rendered can be heard in the appellate court. *Cain v. Harden*, 1 *Oregon*, 360.

220. A case dismissed may be restored during the same term upon good cause shown, on notice to the opposite party, and unless so restored, dismissal shall be final and a bar to any other appeal. (See *Rules Cal. Sup. Ct.*; *Stack v. Barnes*, 2 *Cal.* 16; *Haight v. Gay*, 8 *Cal.* 297.) It will not be restored unless the appellant shall make it appear, not only that there has been no want of diligence on his part, but that, at least in the opinion of his counsel, the appeal has been taken in good faith, and that there are substantial errors in

the record which ought to be corrected by the Supreme Court. (*Hagar v. Mead*, 25 *Cal.* 599.) A case will be reinstated where fraud or imposition has been used in procuring its dismissal. *Rowland v. Kregenhagen*, 24 *Cal.* 52.

WHAT WILL BE REVIEWED.

221. Only the grounds specified in the court below will be considered on appeal. (*Meakings v. Cromwell*, 5 *N.Y.* (1 *Seld.*) 136; *Tattersall v. Hass*, 1 *Hilt.* 56; *Parsons v. Desbrow*, 1 *E.D. Smith*, 547; *Dunham v. Simmons*, 3 *Hill*, 609; *Durging v. Ireland*, 14 *N.Y.* 322; *Barber v. Rose*, 5 *Hill*, 76; *Edgerton v. Thomas*, 9 *N.Y.* 40.) The right to review errors on appeal is the same in cases at law and cases in equity. *Hallock v. Jaudin*, 34 *Cal.* 167.

222. Errors in Judgment Roll.—The Supreme Court will take notice of errors appearing in the judgment roll, even if not named in the specification of errors in the statement. (*Sharp v. Daugney*, 33 *Cal.* 505.) But not minor errors, if on the whole record the decree be right. (*Goode v. Smith*, 13 *Cal.* 81.) On an appeal from the judgment, where there is no statement, the appellate court will only consider matters appearing in the judgment roll. (*Harper v. Minor*, 27 *Cal.* 107.) And from an order sustaining or overruling a demurrer. (*Burgoyne v. Holmes*, 3 *Cal.* 50; *Moraga v. Emeric*, 4 *Id.* 308; *Moulton v. Ellmaker*, 30 *Id.* 527.) But the Court cannot review an order refusing to dissolve an attachment. *Alexander v. Fritts*, 24 *Cal.* 447.

223. Errors in Law.—Errors in law will be reviewed in the appellate court, although a new trial was not asked. (*Brown v. Tolles*, 7 *Cal.* 399.) If no errors are assigned in the record, the appellate court will only review the judgment roll. (*Millard v. Hathaway et al.*, 27 *Id.* 119, 137.) They may be reviewed on a bill of exceptions. (*McCartney v. Fitz Henry*, 16 *Cal.* 184; *Collier v. Corbett*, 15 *Id.* 183; *Walls v. Preston*, 25 *Id.* 59.) It has been held that, on the entire ab-

sence of a written decision of the Judge, a referee trying a cause without a jury may be an error reviewable on appeal. (*Russell v. Armador*, 2 *Cal.* 305; *Ragan v. McCoy*, 26 *Mo.* 166; *Sutter v. Streit*, 21 *Id.* 157; *Bates v. Bower*, 17 *Id.* 550.) The question whether judgment should be reversed for this error was raised, but not decided, in (*Parsons v. Suydam*, 3 *E. D. Smith*, 276; *Sands v. Church*, 6 *N.F.* 347.) The failure of the Judge to specify in his decision the relief granted or the determination of the action is an error reviewable on appeal from the judgment. (*Chamberlain v. Dempsey*, 14 *Abb. Pr.* 241.) When a motion is granted in the court below, entirely upon alleged errors of law, the Supreme Court will review the action of the court below as in other cases. *O'Brien v. Brady*, 23 *Cal.* 243.

224. Errors in the Rulings.—The errors in the rulings of the Court in the progress of the trial are subject to review, when the exceptions are preserved by bill of exceptions, or brought up in a statement on appeal; (*Carpentier v. Williamson*, 25 *Cal.* 154;) although no motion for a new trial is made or overruled. (*Soule v. Dawes*, 6 *Cal.* 473; *Allen v. Hill*, 16 *Cal.* 117.) Where the questions in a case arise upon motion for nonsuit, and upon the action of the Court in giving and refusing instructions, a motion for new trial is unnecessary. *Sullivan v. Cary*, 17 *Cal.* 80; *Darst v. Rush*, 14 *Cal.* 81.

225. Evidence.—The Supreme Court will look at the evidence so far only as to see the relevancy of the exceptions taken during the trial. (*Carpentier v. Williamson*, 25 *Cal.* 154.) On appeal from an order granting or refusing a new trial, the Supreme Court always reviews the evidence, if the point is made that the verdict is contrary to the evidence. (*Rice v. Cunningham*, 29 *Cal.* 492.) But in an equity case submitted by the Court to a jury, the appellate court will not review the testimony, if any proof sustains the verdict and judgment. *Pfeiffer v. Reihn*, 13 *Cal.* 643.

226. Facts.—The Court will review the facts of a case only to see if there is a substantial conflict of evidence. (*Rice v. Cunningham*, 29 *Cal.* 492; *Crook v. Forsyth*, 30 *Cal.* 662; *Wilkinson v. Parrott*, 32 *Id.* 102; *Hardenbergh v. Bacon*, 33 *Id.* 356; *Hall v. Bark "Emily Banning," Id.* 522; *Wendt v. Ross*, *Id.* 650.) But on appeal from orders determining the action and preventing a final judgment, questions of fact are reviewable. (*Bates v. Voorhies*, 20 *N.F.* 525.) But the Supreme Court cannot examine the evidence for the purpose of finding a fact.

Ellis v. Jeans, 26 *Cal.* 275; *Carpentier v. Gardener*, 29 *Id.* 160; see *Post*, Note 237.

227. From Final Judgment.—On an appeal from a final judgment, the Supreme Court may review such intermediate orders as involve the merits. (*Cal. Pr. Act*, § 344; *Hihn v. Peck*, 30 *Cal.* 280.) It may review an order overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference. (*Hihn v. Peck*, 30 *Cal.* 280.) Or the original order of reference, in a suit on an accounting. (*Wing v. Huntington*, *Seld. Notes*, 1853, p. 38.) Or any intermediate order involving the merits. (*Atwood v. Small*, 6 *Clarke & Fin.* 232.) But an order denying a new trial cannot be reviewed on an appeal from a final judgment. *Hihn v. Peck*, 30 *Cal.* 280.

228. From Final Judgment.—An appeal from a final judgment includes an appeal from an injunction. (*McGarrahan v. Maxwell*, 28 *Cal.* 75.) And from an order denying a motion to re-tax costs. (*Levy v. Getleson*, 27 *Cal.* 685; *Lusky v. Davis*, 33 *Cal.* 677.) Or an order adding a new party plaintiff. (*Davis v. Mayor of N.Y.*, 14 *N.F.* 526.) Or an order for judgment on demurrer. (*Hollister Bk. of Buffalo v. Vail*, 15 *N.F.* 593; *Paddock v. Springfield Fire and Mar. Ins. Co.*, 2 *Kern.* 591; *Ford v. David*, 12 *How. Pr.* 193; 3 *Abb. Pr.* 385; 5 *Duer*, 684.) Or an interlocutory decree, in an action for an accounting, declaring the rights of parties, and ordering a reference. (*Wing v. Huntington*, 5 *Seld. No.* 38.) Or an order striking out a material part of defendant's answer. (*Cowles v. Cowles*, 9 *How. Pr.* 361.) An order dismissing an attachment, if the appeal is also taken from such order. *Williams v. Glasgow*, 1 *Nev.* 533.

229. Orders.—Orders affecting a substantial right may be reviewed. (*Railroad Co. v. Loutter*, 21 *Wall. U.S.* 510.) On an appeal from an interlocutory order or decree, if the merits be fully before it, the Court will consider them, and make a final decree. (1 *Bro. P. C.* 57; 2 *Bro.* 405; 3 *Id.* 180, 218; 4 *Id.* 582; 5 *Id.* 387, 454, 478; 6 *Id.* 468; 7 *Id.* 208; *Le Guen v. Gouverneur*, 1 *Johns. Cas.* 436; *Jacques v. Meth. Epis. Ch.*, 17 *Johns.* 548; *Bush v. Livingston*, 2 *Cai. Cas.* 66; *Beebe v. Bk. of New York*, 1 *Johns.* 529; *Kane v. Whittick*, 8 *Wend.* 219.) The action of the Court in granting or refusing a new trial is subject to be reviewed by the Supreme Court. (*Valois v. Warner*, 1 *Mo.* 730; *Hill v. Wilkins*, 4 *Id.* 86.) But only on record made and

settled before the order is made. (*Quivey v. Gambert*, 32 *Cal.* 304.) And no objection or exception will be examined, except such as are included in the appellant's statement of points on which he relies. *Moore v. Murdock*, 26 *Cal.* 514.

230. Practice.—A party who appears and contests a motion cannot on appeal object that he had no notice of motion. (*Reynolds v. Harris*, 14 *Cal.* 667.) An objection that notice to quit is necessary should be made at the trial at *nisi prius*. (*Castro v. Gill*, 5 *Cal.* 40.) The objection that the statement and notice do not specify the grounds of motion should be taken in the court below, and, if overruled, will be reviewed in the Supreme Court. (*Brady v. O'Brien*, 23 *Cal.* 244.) Where a party moves for a nonsuit upon a specific ground, he cannot on appeal assume a different position. (*Mateer v. Brown*, 1 *Cal.* 221.) Or that the court below refused a nonsuit, because of no demand made before suit. (*Baker v. Joseph*, 16 *Cal.* 173.) An objection to an order overruling a motion to set aside the judgment and quash the execution. (*Smith v. Curtis*, 7 *Cal.* 584.) The failure of a party to object to the rendition of a judgment upon a report is no waiver of his right to have his exceptions to the report reviewed. *Healey v. Reed*, 2 *Cal.* 322.

231. Statute of Limitations.—The question of the Statute of Limitations cannot be raised, even though pleaded, unless raised in some form on the trial below. *McDonald v. Bear River Company*, 13 *Cal.* 220.

WHAT WILL NOT BE REVIEWED.

232. The appellate court cannot review any portions of an adjudication not actually appealed from. (*Robertson v. Bullions*, 1 *Kern.* 243; *Kelsey v. Western*, 2 *Comst.* 500; *Bell v. Holford*, 1 *Duer.* 58.) Nor which is not included in the printed case. (*Fitus v. Orvis*, 16 *N.Y.* 617; *Otis v. Spencer*, *Id.* 610; *McCan v. Ferrall*, 8 *Clark & Fin.* 30.) Nothing can be taken into consideration that does not appear upon the return. *Spence v. Beck*, 1 *Hill.* 276; *Kilpatrick v. Carr*, 3 *Abb. Pr.* 117; *Ranson v. Grow*, 4 *E.D. Smith*,

18; *Trust v. Delaplaine*, 3 *Id.* 219; *Lynsky v. Pendergrast*, 2 *Id.* 43; *Prentice v. Zane*, 8 *How. U.S.* 470.

233. As a general rule, an objection which might have been obviated in the court below will not be reviewed on appeal. (*Gordon v. Clark*, 22 *Cal.* 533; *Stewart v. Smith*, 14 *Abb. Pr.* 75; *Fowler v. Clearwater*, 35 *Barb.* 143; *Judd v. O'Brien*, 21 *N.Y.* 186; *Jobbitt v. Goundry*, 29 *Barb.* 509; *N.Y. Cent. Ins. Co. v. National Prot. Ins. Co.*, 14 *N.Y.* 85; *Barnes v. Perine*, 12 *N.Y.* 18; *Van Deusen v. Young*, 29 *Barb.* 9; *Bumstead v. Dividend Ins. Co.*, 12 *N.Y.* 81; *Carter v. Hunt*, 40 *Barb.* 89, 93; *Forward v. Harris*, 30 *Barb.* 338; *Hunt v. Hoboken Land Co.*, 1 *Hilt.* 161; *Fenn v. Timpson*, 4 *E. D. Smith*, 276; *Barlow v. Scott*, 24 *N.Y.* 40; *Greason v. Keteltas*, 17 *Id.* 491; *Belknap v. Sealey*, 14 *N.Y.* 143; *Sheldon v. Wood*, 2 *Bosw.* 267; see *Post*, Note 249.) So, errors in favor of an appellant cannot be reviewed. *Weisser v. Dennison*, 10 *N.Y.* 68; *Glassner v. Wheaton*, 2 *E. D. Smith*, 352; *Beach v. Raymond*, *Id.* 496; *Rooney v. Second Av. R.R.*, 18 *N.Y.* 368; *Robbins v. Codman*, 4 *E. D. Smith*, 315; *Fake v. Whipple*, 39 *Barb.* 339.

234. **Costs.**—An error of court in refusing to allow costs cannot be reviewed on an appeal from an order denying a new trial. (*Stevenson v. Smith*, 28 *Cal.* 102.) On appeal from a judgment, an error which might occur in sustaining a motion, after the appeal was perfected, to strike out the cost bill, cannot be reviewed. *Howard v. Richards*, 2 *Nev.* 128.

235. **Evidence.**—As a rule, the Supreme Court acts upon the case precisely as it was presented to the court below, and cannot receive or notice new evidence. (*Mitchell v. Lennox*, 14 *Wend.* 662; *Wendell v. Lewis*, 6 *Paige*, 233; *Studwell v. Palmer*, 5 *Id.* 166; *Attwood v. Small*, 6 *Clark & Fin.* 232; *Deas v. Thorne*, 3 *Johns.*

543.) But documents properly and conclusively authenticated may be supplied upon the argument of the appeal. *Bank of Charleston v. Emeric*, 2 *Sandf.* 718; *Jarvis v. Sewall*, 40 *Barb.* 449; *Dresser v. Brooks*, 3 *Id.* 429; *Ritchie v. Putnam*, 13 *Wend.* 524; *Williams v. Wood*, 14 *Id.* 126; *Burt v. Place*, 4 *Id.* 591; *Armstrong v. Percy*, 5 *Id.* 535.

236. Evidence.—But the Supreme Court will not review the facts of a case, unless a new trial was asked for in the court below, and this whether the case be in equity, or at law, tried by a jury, or by the Court. (*Griswold v. Sharpe*, 2 *Cal.* 17; *Brown v. Graves*, *Id.* 118; *Smith v. Phelps*, 2 *Id.* 120; *Ingraham v. Gildermester*, *Id.* 483; *Rhine v. Bogardus*, 13 *Id.* 73; *Garwood v. Simpson*, 8 *Id.* 101; *Liening v. Gould*, 13 *Id.* 598; *McCartney v. Fitz Henry*, 16 *Id.* 184; *Gagliardo v. Hoberlin*, 18 *Id.* 394; *Deputy v. Stapleford*, 19 *Cal.* 302; *Regla v. Martin*, *Id.* 474; *Burnett v. Pacheco*, 27 *Id.* 408; *People v. Banvard*, *Id.* 470; *Hihn v. Peck*, 30 *Id.* 280; *Racouillat v. René*, 32 *Id.* 450; *Keeran v. Allen*, 33 *Id.* 542; *Rice v. Inskeep*, 34 *Cal.* 224; *Cowing v. Rogers*, 34 *Cal.* 648.) Or unless an assignment of errors shows that the court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial. (*Smith v. Phelps*, 2 *Cal.* 121; *Griswold v. Sharp*, 2 *Id.* 23; *Whitman v. Sutter*, 3 *Id.* 179.) Where the motion for a new trial does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict. *Myers v. Casey*, 14 *Cal.* 542.

237. Facts, Questions of.—The appellate court has no power to review questions of fact upon an appeal from a judgment entered upon the verdict of a jury. (*Dain v. Wyckoff*, 18 *N.Y.* 45; *Oldfield v. N.Y. and Harlem R.R. Co.*, 14 *N.Y.* 310; *Keller v. N.Y. Cent. R.R. Co.*, 24 *How. Pr.* 472; *White v. Douglass*, 7 *N.Y.* 564; *Wright v. Douglass*, 2 *Comst.* 189; *King v. Dennis*, 2 *Id.* 189; *Langley v. Warner*, 3 *Id.* 327; *Rice v. Floyd*, 4 *How. Pr.* 27; *Hill v. Covell*, 1 *Comst.* 522; *Gardner v. McEwen*, 19 *N.Y.* 123.) Or as regards cases tried by a judge. (*Livingston v. Radcliff*, 2 *Comst.* 189; *Sisson v. Barrett*, *Id.* 406; *Dunham v. Watkins*, 2 *Kern.* 556; *Newton v. Bronson*, 3 *Id.* 587; *Griscom v. Mayor of N.Y.*, 2 *Id.* 586; *Hoyt v. Thompson's Ex'rs*, 19 *N.Y.* 207; *Miller v. Schuyler*, 20 *N.Y.* 522; *Newton v. Bronson*, 13 *N.Y.* 587; *Pratt v. Foote*, 9 *Id.* 463; *Dunham v. Watkins*, 12 *Id.* 556.) Or as regards cases tried by a referee. (*Brady v. Brown*,

20 *Cal.* 520; *Bramerd v. N.Y. and Harlem R.R. Co.*, 25 *N.Y.* 496; *Phelps v. McDonald*, 26 *Id.* 82; *Lockwood v. Thorne*, 11 *Id.* 170; *Davis v. Spencer*, 24 *Id.* 386; *Sturgis v. Merry*, 2 *Comst.* 189; *Esterly v. Cole*, 3 *Comst.* 502; *Newton v. Harris*, 1 *N.Y. Code R.* 414; *Colie v. Brown*, *Id.* 416; *Davis v. Allen*, 3 *Comst.* 168; *Borst v. Spelman*, 4 *N.Y.* 284; *Morris v. Husson*, 4 *Seld.* 204; *Bearss v. Copley*, 6 *Seld.* 93; *Western v. Genessee Mut. Ins. Co.*, 2 *Kern.* 258; *Ingersoll v. Bostwick*, 22 *N.Y.* 425.) See, however, as to clearly erroneous finding, (*Garrison v. Howe*, 17 *Id.* 458.) But the decision of a court or referee upon a question of fact, where there is undisputed evidence, may be reversed. (*Pratt v. Foote*, 9 *Id.* 463.) And all the evidence must be considered. (*Stanton v. Wetherwax*, 16 *Barb.* 259; *Tappan v. Butler*, 7 *Bosw.* 480; *Fake v. Whipple*, 39 *Barb.* 339.) So, also, upon a conceded state of facts. *Sanford v. Eighth Av. R.R. Co.*, 23 *N.Y.* 343; *Purchase v. Mattison*, 15 *Abb. Pr.* 402; see *Ante*, Note 226.

238. Findings of Fact.—The findings of fact in the court below will not be reviewed on appeal, unless there was a motion for a new trial; and this, whether the case be in equity or at law, tried by a jury or by the Court. (*Gagliardo v. Hoberlin*, 18 *Cal.* 394; *Allen v. Fennon*, 27 *Cal.* 68.) The Supreme Court cannot consider the question whether the findings of fact are justified by the evidence. (*People v. Barnard*, 27 *Cal.* 474; *Burnett v. Pacheco*, 27 *Cal.* 409.) Alleged errors in finding of fact will not be considered where the findings themselves are immaterial to the decision. (*Klockenbaum v. Pierson*, 22 *Cal.* 160.) Neither the opinions of the Court nor the evidence from any part of the findings of fact, although incorporated therein. (*James v. Williams*, 31 *Cal.* 211.) The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, or if not set aside by the Court on its own motion, become established facts in the case, and cannot be questioned in the Supreme Court for the first time. *Duff v. Fisher*, 15 *Cal.* 375.

239. Findings, Omission of.—The omission of a judge or referee trying a cause to find upon a particular question of fact cannot be reviewed on an appeal from the judgment. (*People v. Albright*, 14 *Abb. Pr.* 305; *Horey v. Cerr*, 8 *Bosw.* 194; *Hulce v. Sherman*, 13 *Id.* 411; *Platt v. Thorne*, 8 *Bosw.* 574; *Sharp v. Wright*, 35 *Barb.* 236; *Ingraham v. Gilbert*, 20 *Barb.* 151.) Where the Court fails to find the facts which the evidence establishes, a motion for a new trial—that is, to set aside and modify the findings—having been made, the

Supreme Court will look into the evidence for such facts, and is not concluded by the findings of the court below. (*Riley v. Heisch*, 18 *Cal.* 198; *Medor v. Parsons*, 19 *Id.* 294.) The Supreme Court is not authorized to presume the finding of a fact not within the issue. (*Bernal v. Glein*, 33 *Cal.* 668; *Gifford v. Carvill*, 29 *Cal.* 589.) Nor look beyond the findings contained in the case in order to draw inferences of fact bearing on the appeal. (*Stewart v. Smith*, 14 *Abb. Pr.* 75.) Except for the purpose of giving a construction to an ambiguous finding. (*Spencer v. Ballou*, 18 *N.Y.* 327; *Carman v. Pultz*, 21 *Id.* 547; *Terry v. Wheeler*, 25 *Id.* 520.) Neither can this Court review the determination of the court below on questions of fact, on an appeal from an order granting a new trial. *Hoyt v. Thompson*, 19 *N.Y.* 207; *Miller v. Schuyler*, 20 *Id.* 522; *Moore v. Westervelt*, *N.Y. Code R.* 415.

240. Instructions.—The appellate court will not pass upon the correctness of the instructions given by the Court to the jury, if the plaintiff is not entitled to recover upon his own showing. (*Enright v. S. F. and S. J. R.R. Co.*, 33 *Cal.* 230.) Though the instructions may not be technically correct, the Supreme Court will not interfere if the question upon which the case turns was fairly put before the jury. *Smith v. Harper*, 5 *Cal.* 329.

241. Irregularities.—If the decision or verdict is regular, mere irregularities on the trial will not be reviewed. As to form of judgment as entered, see (*Ingersoll v. Bostwick*, 22 *N.Y.* 425; *Johnson v. Carnley*, 10 *Id.* 570; *Witherhead v. Allen*, 28 *Barb.* 661; *King v. Stafford*, 5 *How. Pr.* 30; *Mayor of N.Y. v. Lyons*, 24 *How. Pr.* 280.) Nor the entry of judgment in disregard of an order staying proceedings. (*Elwell v. Dodge*, 33 *Barb.* 336.) But where it had been entered in a grossly irregular manner, and the court below refused to correct it, the error would be reviewed. (*Johnson v. Farrell*, 10 *Abb. Pr.* 384.) If a judgment is just in the main, mere technical irregularities of form will be disregarded. *People v. McCauley*, 1 *Cal.* 379; *Webster v. King*, 33 *Cal.* 348.

242. Matter in Discretion of Court.—As to refusal of a referee to adjourn a hearing, where it was a matter resting in his discretion, see (*Carpenter v. Haynes*, 1 *N.Y. Code R.* 414.) Denial of motion to stay trial till the decision in another cause. (*James v. Chalmers*, 6 *N.Y.* 209.) An order denying a motion for a new trial. (*Fry v. Bennett*, 7 *Abb. Pr.* 352; 16 *How. Pr.* 385.) Or that a judgment

for defendant is improper, the answer containing no prayer for relief. (*Towdy v. Ellis*, 22 *Cal.* 650.) The appellate court will not inquire into the reasons which induced the Judge to sign the bill after the statutory period. (*People v. Lee*, 14 *Cal.* 510.) Nothing but an abuse of discretion on his part, or a great preponderance of evidence against the verdict, will warrant an appellate court in interfering. *Gove v. Moses*, 1 *Wash. Ter.* 13; *Daws v. Glasgow, Burn.* (*Wis.*) 8; *Newby v. Territory of Oregon*, 1 *Oregon*, 163.

243. Order by Consent.—The Supreme Court will not hear any objections to an order entered by consent of parties. (*Meerholz v. Sessions*, 9 *Cal.* 277.) A court of appellate jurisdiction cannot reverse a judgment produced by the voluntary act of a party. (*Paul v. Armstrong*, 1 *Nev.* 82.) And no decision on any point rendered at the suggestion of the appellant can be reviewed. (*Ford v. David*, 1 *Bosw.* 569; *Fairbanks v. Corlies*, 3 *E. D. Smith*, 582; 1 *Abb. Pr.* 150; *Orser v. Grossman*, 4 *E. D. Smith*, 443.) A judgment entered upon stipulation cannot be reviewed, even though both parties consent. (*Gridley v. Daggett*, 6 *How. Pr.* 280; *Townsend v. Masterson Stone Dressing Co.*, 15 *N.Y.* 587.) So in special cases. *McAllister v. Albion Plank Road Co.*, 6 *Seld.* 353; *Matter of Canal and Walker St's*, 2 *Kern.* 406; *N.Y. Cent. R.R. v. Marvin*, 1 *Kern.* 276; *Commissioners of Gaines v. Albion Plank Road Co.*, 7 *How. Pr.* 301.

244. Pleadings.—A judgment cannot be reviewed, on the ground of a defective complaint, or that the judgment is not warranted by the findings, on an appeal from an order denying a new trial. *Jenkins v. Frink*, 30 *Cal.* 586.

245. Questions.—Questions not directly involved, and those unnecessary to a judgment of affirmance or reversal, will not be considered. (*West v. Smith*, 5 *Cal.* 96.) Or questions not presented in good faith. (*People v. Pratt*, 30 *Cal.* 223.) Or questions not arising in the due course of litigation. (*Id.*) Questions of discretion of the Judge cannot be reviewed in the Supreme Court, except in cases of gross abuse, to the injury of the party. (*Smith v. Billett*, 15 *Cal.* 26; *Smith v. Richmond*, 15 *Id.* 501; *O'Brien v. Brady*, 23 *Id.* 243.) The refusal of the Court or referee to allow a witness to be recalled. (*Thomas v. Fleury*, 26 *N.Y.* 26; *Trimble v. Stilwell*, 4 *E. D. Smith*, 512.) The allowance of a leading question. (*Budlong v. Van Nostrand*, 24 *Barb.* 25.) Granting or refusing leave to amend a pleading. (4

Cranch, 237; 5 *Id.* 11, 187; 4 *Wheat*. 220; *Van Duzer v. Howe*, 21 *N.Y.* 531; *Hodges v. Tenn. Ins. Co.*, 8 *Id.* 416; *Hunt v. Huds. Riv. Fi. Ins. Co.*, 2 *Duer*, 480; *Van Ness v. Bush*, 14 *Abb. Pr.* 33; *St. John v. Northrup*, 23 *Barb.* 25; *Hendricks v. Decker*, 35 *Barb.* 298; *Kissam v. Roberts*, 6 *Bosw.* 154; *Woodruff v. Hurson*, 32 *Barb.* 557; *Robbins v. Richardson*, 2 *Bosw.* 248; *Ford v. David*, 1 *Id.* 569; *Gould v. Rumsey*, 21 *How. Pr.* 97; *Wright v. Hollingsworth*, 1 *Pet. U.S.* 165; *White v. Wright*, 22 *How. U.S.* 19; *Eberly v. Moore*, 24 *Id.* 147.

246. Rulings.—Where a new trial was granted on one of several grounds, the order will not be reversed if it was in the discretion of the Court to make it upon any of the grounds stated. (*Oullahan v. Starbuck*, 21 *Cal.* 413.) Where a new trial has been granted by the District Judge, in the absence of an affirmative showing of error his ruling will be deemed correct. (*Page v. O'Brien*, 36 *Cal.* 559.) But inconsequential rulings and decisions on which error is assigned will not be considered. *Paige v. O'Neal*, 12 *Cal.* 483; *Kisling v. Shaw*, 33 *Cal.* 425.

WHEN EXCEPTIONS MUST BE TAKEN.

247. It is a general rule of practice, that no point arising in the pleadings or evidence, which has not been brought to the notice of the inferior courts, will be reviewed on appeal. (*Brockett v. Brockett*, 3 *How. U.S.* 692; *West v. Smith*, 7 *Id.* 402; *United States v. Larkin*, 18 *Id.* 557.) The Supreme Court will examine the case only upon the errors assigned by the appellant, and not look into the exceptions taken by respondent; (*Jackson v. F. R. Water Co.*, 14 *Cal.* 18;) even if made by stipulation. (*Paul v. Magee*, 18 *Id.* 698.) Only errors committed against the appellant will be examined. *Seward v. Malotte*, 15 *Cal.* 304.

248. The Supreme Court of Arkansas will not consider an appeal where there was no motion for a new trial, nor any exceptions taken to any ruling or decision

of the court. (Martin *v.* Jackson, 21 *Ark.* 286; Gardner *v.* Miller, *Id.* 398; Henry *v.* Green, *Id.* 401; Sebastian Co. *v.* Sutton, *Id.* 402; Frost *v.* Wiggins, *Id.* 403; Walker *v.* Swigart, *Id.* 404; Baker *v.* State, *Id.* 405; Watson *v.* Jones, 16 *La. An.* 98.) Where the record fails to show that any exceptions were taken to the ruling, it will not be reviewed by the Supreme Court. (Roehl *v.* Baasen, 8 *Minn.* 26; St. Paul *v.* Kurby, *Id.* 154; O'Connor *v.* O'Connor, 15 *Iowa.* 303; Cain *v.* Story, 15 *Id.* 378; Wilcox *v.* Hawley, 31 *N.Y.* 648; Hunt *v.* Bloomer, 13 *Id.* 341.) For errors cannot be relied on which are not raised in the court below. McCartney *v.* Fitz Henry, 16 *Cal.* 184; Collier *v.* Corbett, 15 *Id.* 183; Morgan *v.* Hugg, 5 *Id.* 409; Holverstot *v.* Bugby, 13 *Cal.* 43; Garroll *v.* Young, 22 *Ind.* 270.

249. Only such questions of law as were properly raised by exceptions in the court below. (Ingersoll *v.* Bostwick, 22 *N.Y.* 425; Otis *v.* Spencer, 16 *Id.* 610; Magie *v.* Baker, 14 *N.Y.* 435; Hunt *v.* Bloomer, 3 *Kern.* 341; Stewart *v.* Smith, 14 *Abb. Pr.* 75.) Objections which must be taken in the court below, and which cannot be raised for the first time in the appellate court. But objections which could not possibly have been obviated, though not mentioned before, may be raised at any time. (Beekman *v.* Frost, 18 *Johns.* 544; Palmer *v.* Lorillard, 16 *Id.* 348; Cole *v.* Blunt, 2 *Bosw.* 116; Sanford *v.* Granger, 12 *Barb.* 392; Pepper *v.* Haight, 20 *Id.* 429; Waller *v.* Harris, 20 *Wend.* 555.) An objection must be made to the substantial cause of action, not to its technical form. (Mott *v.* Smith, 16 *Cal.* 533.) So, objections to the jurisdiction of the court. (Mott *v.* Smith, 16 *Cal.* 533; Valarino *v.* Thomp-

son, 7 *N.Y.* 576.) Or to absence of any cause of action in the complaint. (*Russell v. Ford*, 2 *Cal.* 86; *Gregory v. Ford*, 14 *Id.* 138; *Barron v. Frink*, 30 *Id.* 486; *Himmelman v. Danos*, 35 *Cal.* 441; *Cole v. Blunt*, 2 *Bosw.* 116; *Rayner v. Clark*, 7 *Barb.* 581; *Lounsbury v. Purdy*, 18 *N.Y.* 515.) Or where the complaint contains such defects as to show that plaintiff could not at any time obtain any judgment upon the cause of action alleged. (*Hentsch v. Porter*, 10 *Cal.* 555.) Or where a bill in equity shows on its face that plaintiff is not entitled to relief, even though no demurrer be filed. (*White v. Fratt*, 13 *Cal.* 521.) Or where objections to evidence, though not made in the court below, could not be under any circumstances there obviated. *Mott v. Smith*, 16 *Cal.* 533; see *Ante*, Note 233.

250. Evidence.—*Objections to evidence* must be entered of record below. (*Potter v. Karney*, 8 *Cal.* 574; *Mott v. Smith*, 16 *Id.* 535; *Payne v. Treadwell*, 16 *Id.* 247; *Mechanics' Bank of Alexandria v. Seton*, 1 *Pet. U.S.* 299.) Or objections that there was no proof of the absence of witness whose depositions were read. (*Lockhart v. Mackie*, 2 *Nev.* 294.) Where a material fact was assumed in the court below, without any objection of the want of evidence thereof, such objection cannot be raised upon appeal. (*Jencks v. Smith*, 1 *N.Y.* 40; *Paige v. Fazackery*, 36 *Barb.* 392; *Munson v. Hegeman*, 10 *Id.* 112; *Willard v. Bridge*, 4 *Id.* 361; *Hunter v. Sandy Hill*, 6 *Hill*, 410; *Thurman v. Cameron*, 24 *Wend.* 87; *Oakley v. Van Horne*, 21 *Id.* 305; *Ford v. Monroe*, 20 *Id.* 211; *Beekman v. Bond*, 19 *Id.* 444; *Patterson v. Westervelt*, 17 *Id.* 545; *Jackson v. Roberts*, 11 *Id.* 422.) Exceptions to the admissibility of a deed in evidence must be taken advantage of at *nisi prius*. (*Posten v. Rasette*, 5 *Cal.* 467.) Where parol testimony to vary the terms of a written agreement is offered, and received without objection, the objection that it was inadmissible cannot be raised in the Supreme Court. (*Tebbs v. Weatherwax*, 23 *Cal.* 58.) If incompetent evidence is admitted, and treated as competent, the question of its competency cannot be raised in the appellate court. (*Curiac v. Packard*, 29 *Cal.* 194.) Where the objection to the admission of testimony in the trial is *general*, it cannot be made *spe-*

cial for the first time in the Supreme Court. (*People v. Glenn*, 10 *Cal.* 32.) Objection must be taken in court below.

251. Findings.—The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, cannot be reviewed. (*Duff v. Fisher*, 15 *Cal.* 375.) So with objections to a master's report. (*Hudgins v. Kemp*, 20 *How. Pr.* 45, 54; *Kinsman v. Parkhurst*, 18 *Id.* 289.) Or to the report of commissioners appointed to ascertain an amount due. (The "Virgin," 8 *Pet. U.S.* 538.) If the Court, in its finding of fact, fails to find an issue made in the pleadings, the defect must be excepted to in the court below. (*Merrill v. Chapman*, 34 *Cal.* 251.) So of the omission to find upon a particular question of fact. (*Sharp v. Wright*, 35 *Barb.* 236; *Ingraham v. Gilbert*, 20 *Id.* 151; *People v. Albright*, 14 *Abb. Pr.* 305; 23 *How. Pr.* 306; *Heroy v. Kerr*, 8 *Bosw.* 194; 21 *How. Pr.* 409; *Hulce v. Sherman*, 13 *Id.* 411; *Platt v. Thorne*, 8 *Bosw.* 574.) The only question that can be raised in the Supreme Court upon the findings, if no exception is taken to them, is: Are they consistent with the judgment? *James v. Williams*, 31 *Cal.* 211; *Lucas v. San Francisco*, 28 *Cal.* 591.

252. Instructions.—Where instructions to the jury are not excepted to at the time they are given or refused, they cannot be considered on appeal. (*Collier v. Corbett*, 15 *Cal.* 186; *Payne v. Treadwell*, 16 *Id.* 247; *Letter v. Putney*, 7 *Cal.* 423; *St. John v. Kidd*, 26 *Id.* 263.) The objection that the Court directed the jury to find specially as to a particular fact. *People v. Chu Quong*, 15 *Cal.* 332.

253. Irregularity in Proceedings.—The objection that the jury in the court below was not duly selected and summoned as required by law must be excepted to in the court below. (*Spencer v. Doane*, 23 *Cal.* 418.) As to the improper allowance of interest on a running account, the judgment will not be reversed. (*Whiting v. Clark*, 17 *Cal.* 407.) Where no exceptions were taken to the reading of the Statute Law and decisions of the Supreme Court to the jury, there is no ground of error. (*People v. Galvin*, 9 *Cal.* 115.) Or to the reading of a portion of answer which had been stricken out. (*Morgan v. Hugg*, 5 *Cal.* 409.) Or that an account presented to the supervisors of a county, was not authenticated as required by statute. *Randall v. Yuba Co.*, 14 *Cal.* 219.

254. Parties.—To be reviewable, objection must be taken to parties or the joinder of parties in the court below. (*Sands v. Pfeiffer*, 10 *Cal.* 258; The "Commander-in-Chief," 1 *Wall. U.S.* 43; *Livingston v. Woodworth*, 15 *How. U.S.* 546.) Or that certain parties could not intervene. *McKenty v. Gladwin*, 10 *Cal.* 227.

255. Pleadings.—Exceptions must taken in the court below to objections to the form of a complaint or answer. (*Sutter v. Cox*, 6 *Cal.* 415; *People v. Jones*, 29 *Cal.* 50; *Peterson v. Hornblower*, 33 *Id.* 266; *King v. Davis*, 34 *Cal.* 100; *Kuhland v. Sedgwick*, 17 *Cal.* 123.) Or that a supplemental complaint should have been filed. (*Van Maren v. Johnson*, 15 *Cal.* 308.) Or that two counts in a complaint on an equitable action should not be tried by a jury. (*Baker v. Joseph*, 18 *Cal.* 173.) Or an objection to the complaint which defeats only plaintiff's present right to recover. (*Henstch v. Porter*, 10 *Cal.* 555.) Or that the complaint is defective, because it is not alleged that plaintiff's claim was presented to the administrator for allowance. (*Peterson v. Hornblower*, 33 *Cal.* 266.) If the plaintiff, on the trial, treats an allegation of the complaint as denied in the answer, he cannot raise the point in the Supreme Court for the first time that such allegation is not denied. (*Racouillat v. Rene*, 32 *Cal.* 450.) So, in matters of defense not brought forward at the trial. *Bell v. Bruen*, 1 *How. U.S.* 169; *Findlay v. Hinde*, 1 *Pet. U.S.* 241.

CHAPTER V.

PRINCIPLES OF DETERMINATION.

255. The question before an appellate court is: Was the *judgment* correct?—not the *ground* on which the judgment professed to proceed. (*McCluny v. Silliman*, 6 *Wheat.* 598; *Davis v. Packard*, 6 *Pet. U.S.* 41.) The Supreme Court may direct the court below to render the proper judgment. (*Love v. Shartzer*, 31 *Cal.* 487.) And the court below has no authority to enter a different judgment from that directed. *Argenti v. Sawyer*, 32 *Cal.* 414; *Meyer v. Kohn*, 33 *Cal.* 484.

256. It cannot revise its own judgments, but when proceedings founded on them are brought up for review it will make such orders as necessary to cause the judgment to be enforced. (*Argenti v. San Francisco*, 30 *Cal.* 458.) An erroneous judgment cannot be corrected by bringing suit in the nature of a bill of review. The proper method is by appeal. (*Savings and Loan Society v. Thompson*, 32 *Cal.* 347; 34 *Cal.* 75.) The practice of giving the reason in writing for judgment is of modern origin. It is discretionary with the Court whether it give an opinion upon pronouncing judgment, and if given, whether it be oral or in writing. *Houston v. Williams*, 13 *Cal.* 24.

257. Existing laws at the time of the appeal are to govern the decision. (The "*Peggy*," 1 *Cranch*, 103;

Harting *v.* The People, 22 *N.Y.* 95.) And this Court is bound to decide according to the law of the whole case, and not upon particular points raised by counsel. Consult *Post*, "*Law of the Case*;" Hubbard *v.* Sullivan, 18 *Cal.* 508.

258. In chancery cases, the Supreme Court has full power and jurisdiction, for the purposes of equity, to correct errors of the Court below, in whatever shape or by whatever party appeal is taken up. (Grayson *v.* Guild, 4 *Cal.* 122.) Errors which the court below can and will correct on motion should not be made the ground of an appeal. (Bunbury *v.* Bolton, 1 *Bro. P.C.* 434.) Such as clerical and arithmetical errors. (Rogers *v.* Hosack, 18 *Wend.* 319; Nevins *v.* Bay State Steamboat Co., 4 *Bosw.* 225.) Or errors which might have been cured by amendment, or questions as to variance or regularity. *N.Y. Central Ins. Co. v. National Protection Ins. Co.*, 4 *Kern.* 85; Johnson *v.* Carnly, 6 *Seld.* 570; Bate *v.* Graham, 1 *Kern.* 237; Lounsbury *v.* Purdy, 18 *N.Y.* 515; Bank of Havana *v.* Magee, 20 *N.Y.* 355; Ingersoll *v.* Bostwick, 22 *N.Y.* 425; Bennett *v.* Judson, 21 *Id.* 238; Cardell *v.* McNiel, *Id.* 341; Lake Ontario R.R. *v.* Marvine, 18 *Id.* 585; Bate *v.* Graham, 11 *Id.* 237; McCormick *v.* Pickering, 4 *Id.* 276.

259. The general rule is that if error intervenes the judgment must be reversed; but if during subsequent proceedings the foundation of the error is overthrown, and facts are shown to support the rulings of the Court, the error is cured. (People *v.* Anderson, 26 *Cal.* 130.) Or where error in course of the trial was fully corrected, or the exception waived. (Weber *v.* Kingsland, 8 *Bosw.* 415; Schenectady and Saratoga R.R. Co. *v.* Thatcher,

11 *N.Y.* 102; *Kent v. Harcourt*, 33 *Barb.* 491; *Miller v. The Eagle Life and Health Ins. Co.*, 2 *E.D. Smith*, 284; *Colvin v. Burnett*, 2 *Hill*, 620; *Hearsey v. Pruyn*, 7 *Johns.* 179; *Oakes v. Thornton*, 8 *Fost.* 44; *Carson v. Allen*, 6 *Dana*, 395.

260. When a finding is sought to be impeached, the appellate court will look into the evidence for the purpose of supporting it. (*Spencer v. Ballou*, 18 *N.Y.* 327; *Cady v. Allen*, 18 *N.Y.* 573; *Stewart v. Smith*, 14 *Abb. Pr.* 75.) And all the findings in an action must be construed together. (*Polack v. McGrath*, *Cal. Sup. Ct., Oct. T.*, 1869.) And a finding of fact may be construed by a finding of law. (*Smith v. Devlin*, 23 *N.Y.* 363.) The Court should look into the evidence to supply a finding of fact in support of the judgment. (*Sinclair v. Tallmadge*, 35 *Barb.* 602; *Higgins v. Moore*, 6 *Bosw.* 344; *Spencer v. Ballou*, 18 *N.Y.* 327.) The appellate court must look into the record to see if there is any foundation for a judgment appealed from. (*Howard v. Richards*, 2 *Nev.* 128.) If the complaint contains one good count, and the findings of fact are defective, but the court below is not asked to find the omitted facts, the judgment will not be disturbed. *Lucas v. City of San Francisco*, 28 *Cal.* 591.

261. **Errors in Evidence.**—Where this Court sees clearly and beyond doubt that the admission or rejection of improper evidence could in no way materially affect the result, the judgment on that ground will not be disturbed. (*Persse v. Cole*, 1 *Cal.* 369; *Mills v. Barney*, 22 *Id.* 240; *Kidd v. Temple*, 22 *Id.* 255; *Henry v. Everts*, 30 *Cal.* 425; *Onondaga Mut. Ins. Co. v. Minard*, 2 *N.Y.* 98; *Lowery v. Steward*, 3 *Bosw.* 505; *Boyd v. Foot*, 5 *Id.* 110; *Barton v. Syracuse*, 37 *Barb.* 292; *Diven v. Phelps*, 34 *Barb.* 224.) Or where it could have no effect on the verdict. (*Young v. Emerson*, 18 *Cal.* 416.) Or

when it is plain that the result must have been the same without such evidence. (*Belmont v. Coleman*, 1 *Bosw.* 188; *Fitch v. N.Y. and Erie R.R. Co.*, 3 *Seld. Note* 24.) Or where defendant had suffered no injury thereby. (*Hicks v. Whiteside*, 23 *Cal.* 404; *Paige v. O'Neal*, 12 *Cal.* 483; *Hoag v. Pierce*, 28 *Cal.* 187; *Tyler v. Green*, *Id.* 406; *Boyce v. Cal. Stage Co.*, 25 *Cal.* 460; *Norwood v. Kenfield*, 30 *Cal.* 393; *Moon v. Rollins*, 36 *Cal.* 333.) Or if the party would not have been entitled to recover if the excluded testimony had been admitted. (*Merle v. Matthews*, 26 *Cal.* 455.) As where there was sufficient uncontradicted evidence to warrant the verdict. (*Zeigler v. Wells*, 28 *Cal.* 263.) Or where the same facts were afterwards proved by competent evidence. (*Schenck v. Dart*, 22 *N.Y.* 420; *Castree v. Gavelle*, 4 *E. D. Smith*, 425; *Colvin v. Burnett*, 2 *Hill*, 620.) Or where admitted by the pleadings. *Diven v. Phelps*, 34 *Barb.* 224; *Castree v. Gavelle*, 4 *E. D. Smith*, 425.

262. Error in Evidence.—So, the improper exclusion of evidence upon a question finally decided in favor of appellant will not be a ground for reversing the judgment. (*Beekman v. Platner*, 15 *Barb.* 550.) Or the exclusion of a question which had been already answered in substance by the witness. (*Park Bank v. Tilton*, 15 *Abb. Pr.* 384.) Or permitting a witness to be questioned as to his *opinion*, provided the answer only stated facts. (*Doolittle v. Eddy*, 7 *Barb.* 74.) Or forbidding a witness to testify from a written paper, if he did not subsequently give any testimony. (*Howland v. Willetts*, 9 *N.Y.* 170.) So, the refusal to permit an answer to a proper question becomes immaterial by the introduction of the same matter under a subsequent interrogatory. (*Real Del Monte G. and S. M. Co. v. Thompson*, 22 *Cal.* 542.) Or the improper exclusion of a witness, if the fact proposed to be proved by him could not have affected the result. *City B'k of Brooklyn v. Dearborn*, 20 *N.Y.* 244.

263. Error in Law.—An erroneous ruling that a party was bound to prove certain averments, if evidence was subsequently given without contradiction which entitled the adverse party to recover. (*Gildersleeve v. Mahoney*, 5 *Duer*, 383.) Submission of a question to the jury, proper for the Court, where the decision by the Court must have been the same. (*Miller v. Eagle Life and Health Ins. Co.*, 2 *E. D. Smith*, 269.) Error in instructions on a point entirely immaterial to the case. (*Shorter v. People*, 2 *N.Y.* 193; *Wolloughby v. Comstock*, 3 *Hill*, 389; *People v. Wiley*, 4 *Id.* 194; *Hayden v. Palmer*, 2 *Id.* 205.)

Or which could not possibly have misled the jury. *Johnson v. Hudson Riv. R.R. Co.*, 20 *N.Y.* 74; *Taff v. Warman*, 2 *N.Y. Code R.* 740; *Smith v. N.Y. Cent. R.R.* 29 *Barb.* 132.

264. Error in Pleadings.—If the Court refuses to allow defendant to amend his answer, but no injury results from the refusal, the judgment will not be reversed on this ground. (*Jones v. Block*, 30 *Cal.* 227.) Nor for defects in the complaint, where it can be gathered therefrom as a whole that the plaintiff had a cause of action upon which he was entitled to judgment, however defectively the cause of action may have been stated. (*Hallock v. Jaudin*, 34 *Cal.* 167.) The appellate court will not reverse an order or judgment for immaterial errors, or for such as have not really influenced the result to the prejudice of the appellant. *Howland v. Willetts*, 5 *Seld.* 170; *Onondaga Co. Mut. Ins. Co. v. Minard*, 2 *Comst.* 98; *Shorter v. The People*, 2 *Comst.* 193.

265. Harmless Errors.—A judgment will not be reversed for error that can in no respect injure the appellant. (*Burnett v. Tolles*, *Cal. Sup. Ct., Oct. T.*, 1869; *Kilburn v. Ritchie*, 2 *Cal.* 145; *Wilkinson v. Parrott*, 32 *Id.* 102; *Garwood v. Wood*, 34 *Id.* 248; *Campbell v. Pratt*, 2 *Pet.* 354; *The "Water Witch,"* 1 *Black.* 494.) Unless it affirmatively appear that injustice has been done. (*Broadus v. Nelson*, 16 *Cal.* 80; *Robinson v. Smith*, 14 *Id.* 254.) Or for an error favorable to appellant. (*Kilburn v. Ritchie*, 2 *Cal.* 145; *Wilkinson v. Parrott*, 32 *Cal.* 102; *Garwood v. Wood*, 34 *Cal.* 248.) Or for errors not affecting substantial rights. (*People v. Foss*, 20 *Cal.* 586.) Or for errors of the Court which do not materially affect the merits of the case. (*Clayton v. West*, 2 *Cal.* 381; *Carpentier v. Gardner*, 29 *Id.* 160.) Or for errors which do not injure the complaining party. (*Page v. O'Neal*, 12 *Cal.* 483; *Hoag v. Pierce*, 28 *Cal.* 187; *Tyler v. Green*, *Id.* 406; *Boyce v. Cal. Stage Co.*, 25 *Cal.* 460.) Or for errors which affect only the rights of parties who have not appealed. (*Speyer v. Ihmels*, 21 *Cal.* 280.) A party is not injured by an error if the error does not prevent him from making out his case. *Hebraid v. Jefferson G. and S. M. Co.*, 33 *Cal.* 290.

266. Rule of Conflict of Evidence.—The judgment will not be reversed where there appears to have been a substantial conflict of evidence. (*Cook v. Forsyth*, 30 *Cal.* 662; *Wilkinson v. Parrott*, 30 *Cal.* 102; *McNeil v. Shirley*, 33 *Cal.* 202; *Hardenburgh v. Bacon*, *Id.*

356; *Hall v. Bark* "Emily Banning," *Id.* 522; *Wendt v. Ross*, *Id.* 650.) Where the evidence is conflicting, neither the verdict of the jury nor the findings of the Court will be disturbed. (*Johnson v. Pendleton*, 1 *Cal.* 132; *Hoppe v. Robb*, *Id.* 373; *Dwinelle v. Henriquez*, *Id.* 387; *Davis v. Smith*, 2 *Id.* 423; *Amsby v. Dickhouse*, 4 *Id.* 102; *Taylor v. McKinley*, *Id.* 104; *Duel v. B.R. and A.M. Co.*, 5 *Id.* 84; *Adams v. Pugh*, 7 *Id.* 150; *White v. Todd's Water Co.*, 8 *Id.* 443; *People v. Ah Ti*, 9 *Id.* 16; *Scannell v. Strahle*, *Id.* 177; *Weddle v. Stark*, 10 *Id.* 301; *McGarrity v. Byington*, 12 *Id.* 426; *Visher v. Webster*, 13 *Id.* 58; *Baxter v. McKinley*, 16 *Cal.* 76; *Cummings v. Scott*, 20 *Id.* 83; *Tebbs v. Weatherwax*, 23 *Id.* 58; *Besten v. Keys*, *Id.* 193; *Antoine Co. v. Ridge Co.*, *Id.* 219; *Lubeck v. Bullock*, 24 *Id.* 338; *Lyle v. Rollins*, 25 *Id.* 437; *Peterie v. Bugby*, *Id.* 419; *Aldrich v. Palmer*, 24 *Cal.* 513; *Ellis v. Jeans*, 26 *Id.* 272; *Wilcoxon v. Burton*, 27 *Id.* 228; *Carpentier v. Gardner*, 29 *Id.* 160; *Rice v. Cunningham*, 29 *Id.* 492; *Crook v. Forsyth*, 30 *Id.* 662.) The rule applies to law and equity cases alike. (*Ritter v. Stock*, 12 *Cal.* 402; *Doe v. Vallejo*, 29 *Id.* 386.) The same rule applies to the report of commissioners appointed to assess damages and estimate benefits in widening of streets. (Appeal of Piper, 32 *Cal.* 530; Appeal of Brooks and Josephs, 32 *Cal.* 558.) But the rule does not apply where the evidence in the court below consists of depositions. *Wilson v. Cross*, 33 *Cal.* 51.

267. Wrong Reasoning.—An order granting a new trial will not be reversed because the reason assigned is a bad one, if there was a good reason for granting it. (*Bolton v. Stewart*, 29 *Cal.* 615; *Grant v. Moore*, *Id.* 644.) The order stands upon the facts in the record. (*Coghill v. Marks*, *Id.* 673.) If a judgment or order is right, that it could not be sustained upon the theory of law on which the court below proceeded is no reason for reversing it. (*Munro v. Potter*, 34 *Barb.* 358; *Gillespie v. Torrance*, 7 *Abb. Pr.* 462; *Deland v. Richardson*, 4 *Den.* 95; *Davis v. Spencer*, 24 *N.Y.* 386; *Scott v. Pilkington*, 15 *Abb. Pr.* 280; *Mills v. Van Voorhies*, 20 *N.Y.* 412.) A judgment which is right will not be reversed because rendered upon a wrong reason. (*Helm v. Dumars*, 3 *Cal.* 454; *Bliven v. Freer*, 10 *Cal.* 172.) Where a decision was correct when made, it will not be reversed by reason of any matter of fact not shown or offered in the court below. *Wallace v. Eldredge* (No. 2), 27 *Cal.* 498.

LEGAL PRESUMPTIONS.

268. The legal presumption is in favor of the correctness of the findings and decision of the court below, and when attacked, on a motion for a new trial, will be sustained on appeal, unless it be affirmatively shown that they are erroneous. When this is attempted by way of showing that certain specified facts, other than those expressly found by the Court, were proven by the evidence, it must likewise appear that such facts would require a different finding or decision from the one rendered, or the specification will be held insufficient. *White v. Abernathy*, 3 *Cal.* 426; *Landers v. Bolton*, 26 *Cal.* 403; *Moyes v. Griffith*, 35 *Id.* 556; *Mills v. Thorne*, *Cal. Sup. Ct., Oct. T.*, 1869; *Herriter v. Porter*, 23 *Cal.* 385; *Hastings v. Cunningham*, 35 *Id.* 549; *Drummond v. Magruder*, 9 *Cranch*, 122; The "*Potomac*," 2 *Black. U.S.* 581.

269. On appeal, the presumption lies that the court below discharged its duty, that its proceedings were regular, and its action founded on proper proof. (*Bel lows v. Sacket*, 15 *Barb.* 96; *Corning v. Slosson*, 16 *N.Y.* 294; *Keegan v. Western R.R. Co.*, 4 *Seld.* 175; *Beecher v. Conradt*, 11 *How. Pr.* 181; *Bidwell v. Astor Mut. Ins. Co.*, 16 *N.Y.* 262; *Viele v. Troy and Boston R.R. Co.*, 20 *Id.* 184; *Grant v. Morse*, 22 *Id.* 323; *Graves v. McKeon*, 2 *Denio*, 639; *Decker v. Hassell*, 26 *How. Pr.* 528; *Foster v. Hazen*, 12 *Barb.* 547; *Van Slyck v. Taylor*, 9 *Johns.* 146; *Lamotte v. Archer*, 4 *E. D. Smith*, 46; *Stafford v. Williams*, 4 *Den.* 182; *House v. Low*, 2 *Johns.* 378; *Peters v. Diossy*, 3 *E. D. Smith*, 115; *Beattie v. Qua*, 15 *Barb.* 132; *Oakley v.*

Van Horn, 21 *Wend.* 305; Fuller v. Wilcox, 19 *Id.* 351; Tower v. Hewett, 11 *Johns.* 134; Williamson v. Field, 2 *Barb.* 281; Darby v. Callaghan, 16 *N. Y.* 71; Matter of the Empire City B'k, 18 *Id.* 199; Carman v. Pultz, 21 *Id.* 547; Reformed Protestant Dutch Church v. Brown, 24 *How. Pr.* 76; Phelps v. McDonald, 26 *Id.* 82; Hoyt v. Hoyt, 8 *Bosw.* 511; Richardson v. Dugan, *Id.* 207; Harden v. Palmer, 2 *E. D. Smith*, 172.) It will be presumed that the record contains all the evidence. (Orcutt v. Cahill, 24 *N. Y.* 578; Calligan v. Mix, 12 *How. Pr.* 495.) And that the proceedings of the jury were regular. Coughnet v. Eastenbrook, 11 *Johns.* 532; Beekman v. Wright, *Id.* 442; Van Doren v. Walker, 2 *Cai.* 373.

270. The presumption is that all the facts in a record bearing on the points decided have received due consideration by the Supreme Court, whether all or a part or none of those facts are mentioned in the opinion. (Mulford v. Estudillo, 32 *Cal.* 131.) Where there are two presumptions equally reasonable, arising upon the face of the record, the Court is bound to adopt that which will maintain the judgment of the court below. Whippley v. Fowler, 6 *Id.* 630.

271. Evidence.—Where there has been no objection raised or exceptions taken to insufficiency of the evidence, the Court will presume that proper evidence was given. (Bunting v. Beideman, 1 *Cal.* 182.) And objection must be made at the time of its introduction. (Goodale v. West, 5 *Cal.* 341; Covillaud v. Tanner, 7 *Id.* 38; Mott v. Smith, 16 *Id.* 533.) And must be special; it cannot be made special for the first time in the appellate court. (People v. Glenn, 10 *Cal.* 32; Dreux v. Domec, 18 *Id.* 83; Kiler v. Kimball, 10 *Id.* 267.) So of an exception to the admissibility of a deed. (Pearson v. Snodgrass, 5 *Cal.* 478; Posten v. Rasette, *Id.* 467.) The presumption of the law is that there was evidence to sustain every material fact found by the jury. (Doll

v. Anderson, 27 *Cal.* 250.) And that facts imperfectly alleged have been proved. *Barron v. Frink*, 30 *Cal.* 486.

272. Findings.—Where in the trial for injury to a water ditch, by the Court without a jury, and judgment passed for the defendants without any findings of fact being made, the legal presumption is that the court below found all the issues for the defendants. (*Clark v. Willett*, 35 *Cal.* 534.) If the findings are defective, the presumption is that the facts not found were proved, unless the court below is requested to supply the defect, and fails or refuses to do so. *Lyons v. Leimback*, 29 *Cal.* 139.

273. Instructions.—Where the record does not contain the instructions of the court below, the presumption will be that the laws applicable to the facts were correctly given to the jury. *Aldrich v. Palmer*, 24 *Cal.* 515.

274. Practice.—It must be shown that the Court erred in striking out the answer; error will not be presumed. (*Dimick v. Campbell*, 31 *Cal.* 238; *Landers v. Bolton*, 26 *Id.* 393.) When there are both issues of law and fact, joined in the same cause, and the cause is tried on the issues of fact, and a judgment rendered, the presumption will be indulged, on appeal, that the issue of the law had been first disposed of. (*Brooks v. Douglass*, 32 *Cal.* 208; *Townsend v. Jemison*, 7 *How. U.S.* 706.) Exceptions appearing in the case as settled will be assumed to have been taken in due time and form. *Hunt v. Bloomer*, 13 *N.Y.* 341.

WHEN JUDGMENT WILL BE AFFIRMED.

275. The judgment of the court below will be sustained if there is one conclusive ground upon which it can rest. (*Bleven v. Freer*, 10 *Cal.* 172.) When a judgment is correct by the record, it will be affirmed without reference to the grounds upon which it was rendered by the court below. (*Kidd v. Teeple*, 22 *Id.* 255; *Russel v. Williams*, 2 *Id.* 158; *Warner v. Lessler*, 33 *N.Y.* 296; *Otis v. Spencer*, 16 *Id.* 610; 15 *How. Pr.* 425; 6 *Abb. Pr.* 127; *Titus v. Orvis*, 16 *N.Y.* 617.) It

is no objection to an affirmance that judgment can only be sustained on grounds that were not suggested by counsel below. *Oneida Bank v. Ontario Bank*, 21 *Id.* 490; *White v. Madison*, 26 *Id.* 117.

276. When the Supreme Court is equally divided upon an appeal, the judgment stands affirmed. (11 *Wheat.* 59; 10 *Id.* 66; *Washington Bridge Co. v. Stewart*, 3 *How. Pr.* 413.) The Supreme Court will not generally set aside a verdict, where the judge and jury harmonize in its support. (*Antoine Co. v. Ridge Co.*, 23 *Cal.* 219.) Where substantial justice has been done, the appellate court will not reverse the judgment on merely technical grounds. (*Fisher v. Reider*, *Hempst.* 82.) Or for a mere variance. (*Cook v. Gray*, *Id.* 84.) If the appellant can gain nothing by a new trial, judgment will not be reversed. (*Larco v. Casaneuava*, 30 *Cal.* 560.) A judgment will not be reversed for errors that can in no respect injure the appellant. *Thompson v. Lyon*, 14 *Cal.* 39; *Burnett v. Tolles*, *Cal. Sup. Ct.*, *Oct. T.*, 1869; *Mitchell v. Bromberger*, 2 *Nev.* 345.

277. On appeal from judgment on a demurrer as frivolous, judgment should be affirmed if the demurrer was bad though not frivolous. (*Witherhead v. Allen*, 28 *Barb.* 661; *Wesley v. Bennett*, 5 *Abb. Pr.* 498; *Martin v. Kanouse*, 2 *Abb. Pr.* 327; *Laverty v. Griswold*, 12 *N.Y. Leg. Obs.* 316; *Manning v. Tyler*, 21 *N.Y.* 570.) If an appellate court finds that the facts stated in the complaint, with all legal intendments in its favor, will not support the judgment, the judgment must be affirmed, though counsel may have hit on the proper grounds for asking a reversal. (*Van Doren v. Tjader*, 1 *Nev.* 380.) Where the questions raised by the record

have been repeatedly settled by the appellate court, or are decided by reference to plain elementary principles of law, the judgment will be affirmed, with damages. *Pinkham v. Wemple*, 12 *Cal.* 449.

278. When a demurrer to a complaint is properly sustained, with leave to amend, and the plaintiff declines to do so, the judgment will not be reversed on appeal, in order to allow the amendment. There must be error in order to allow the reversal of a judgment. (*Sutter v. San Francisco*, 36 *Cal.* 112.) This Court will not reverse a decision, after a trial on the merits, for defects in the declaration which were amendable in the court below. *Shoenberger's Exrs. v. Zook*, 34 *Penn.* 24.

279. When the case made by plaintiff's proof differs from the averments of the complaint, and defendant does not object to the introduction of evidence on this ground, the Court will not reverse the judgment on account of the variance. (*Marshall v. Ferguson*, 23 *Cal.* 65.) Where the statement contains only an outline of the evidence, without any rulings or instructions of the Court, and not purporting to give all the evidence, and that given not being clearly in favor of the verdict, the appellate court will not interfere. (*Loucks v. Edmondson*, 18 *Cal.* 203.) Where there are no assignments of errors by the appellant, judgment will be affirmed. Affirmative error must be shown. *People v. Goldberg*, 10 *Cal.* 312; *People v. Levison*, 16 *Cal.* 98.

280. The verdict will not be disturbed except for good cause, and damages will be allowed on an appeal from a judgment thereon when no cause is shown for

granting a new trial. (*Field v. Campbell*, 17 *La. An.* 30.) On an appeal from an order made after final judgment, directing receiver to pay over to the prevailing party moneys in his hands, the Supreme Court cannot reverse the order appointing the receiver. *Whitney v. Buckman*, 26 *Cal.* 451.

281. A judgment will not be reversed because of an error which affects the rights of parties who have not appealed, and not those of the appellants. This Court will not reverse a judgment dismissing an action for want of prosecution, unless there has been an abuse of discretion in the court below in giving the judgment; and it devolves on the appellant to show such abuse of discretion. (*Grigsby v. Napa County*, 36 *Cal.* 585.) In Pennsylvania, it has been held that a judgment will not be reversed because the court below erred in prescribing the order in which counsel should address the jury. *Smith v. Frazar*, 53 *Penn.* 226.

282. Where the findings do not contain all the facts necessary to be proved in order to entitle the prevailing party to a judgment, it will not be reversed, unless the court below has, after defect has been pointed out, failed or refused to make the required finding, and exception has been taken thereto. (*Lyon v. Leimback*, 29 *Cal.* 139.) If the facts in issue are not found, and the evidence is not set out in the transcript, the appellate court will not undertake to say that it was proven. Evidence *tending* to prove a fact does not necessarily amount to *proof of the fact*. (*Merrill v. Chapman*, 34 *Cal.* 251.) Where the findings support the judgment, and the record discloses no exceptions to admission of evidence or the rulings of the Court, the judgment will

be affirmed. (*Hutchinson v. Ryan*, 11 *Cal.* 142; *Clark v. Huber*, 20 *Cal.* 196.) A judgment on the report of referee will not be reversed for failure to find on issues, where no evidence would warrant findings in favor of the appellant. *Alger v. Raymond*, 7 *Bosw.* 418.

MODIFICATION OF JUDGMENT.

283. Where the judgment below is erroneous, the appellate court will so modify it as finally to settle the controversy. (*Persse v. Cole*, 1 *Cal.* 369.) * A judgment will be modified and affirmed where there is an error which the record enables the appellate court fully to correct. (*Union Wat. Co. v. Murphy's Flat Fluming Co.*, 22 *Cal.* 620.) Where, in ejectment against several defendants, the judgment for damages is several, the damages may be remitted, and the judgment for the land may stand. (*Curtis v. Herrick*, 14 *Cal.* 117.) Respondent may remit damages and pay costs of appeal. (*Dall v. Feller*, 16 *Cal.* 432; *La Motte v. Archer*, 4 *E. D. Smith*, 46.) Or the excess of damages over amount claimed may be remitted, and the judgment stand. *Pierce v. Payne*, 14 *Cal.* 419.

284. The judgment of a court can only be changed on a petition for rehearing or a modification. (*Houston v. Williams*, 13 *Cal.* 24.) The Court may direct that judgment be affirmed on respondent's remitting that part of it which is erroneous, if capable of exact calculation. (*Chouteau v. Suydam*, 21 *N.Y.* 179; *Boyd v. Foot*, 5 *Bosw.* 110; *McAuley v. Mildrum*, 9 *Abb. Pr.* 198; *Corning v. Corning*, 6 *N.Y.* 97; *Moffett v. Sackett*, 18 *N.Y.* 522; *O'Shea v. Kirker*, 4 *Bosw.* 120; 8 *Abb. Pr.* 69.) Case where the Supreme Court refused

to modify its judgment of reversal, though an offer to remit the damages was made, (*Ellis v. Jeans*, 26 *Cal.* 72.) Case remanded, with directions to add to the judgment the yearly rent of the land as found by the jury. *Bay v. Pope*, 18 *Cal.* 694.

285. Where there is a discrepancy between the findings of fact and the judgment, the appellate court, will order the proper modification of the judgment. (*Clark v. Huber*, 20 *Cal.* 196.) The appellate court, in reversing a judgment and directing the entry of a judgment in the court below, does not order a new trial. (*Argenti v. San Francisco*, 30 *Cal.* 458.) A judgment cannot be *affirmed as to part* of the amount recovered, and *reversed as to the residue*, as between the same parties, where a *new trial* is granted as to the *part reversed*. *Story v. N.Y. and Harlem R.R. Co.*, 2 *Seld.* 85.

286. Where an appeal is only from an order denying a new trial, the appellate court may go back to the complaint and strike out one or more causes of action, and may modify the judgment. (*Argenti v. San Francisco*, 30 *Cal.* 458.) In an action for the recovery of chattels, the Supreme Court should modify the judgment by making it in the alternative for the return of the property or for its value. *Fitzhugh v. Wiman*, 9 *N.Y.* 559; *Bartlett v. Judd*, 23 *Barb.* 262; *O'Shea v. Kirker*, 4 *Bosw.* 120.

287. Whether on reversing a judgment, the Court has power to order a proper judgment to be entered, *query*, (*Fraser v. Child*, 4 *E. D. Smith*, 243.) The Court, on reversing a judgment, can render such judgment as the court below should have done. (*Gahn v.*

Neville, 2 *Cal.* 81; Bidleman *v.* Kewen, *Id.* 248.) Mistakes can only be corrected by reversal of the judgment, and that appellate court could not correct the error, (*Hardy v. Seelye*, 3 *Abb. Pr.* 103; 1 *Hilt.* 90; *Bunker v. Latson*, 1 *E. D. Smith*, 410; *Fanning v. Lent*, 3 *E. D. Smith*, 206; *Edwards v. Drew*, 2 *Id.* 55; *contra*, *Fields v. Moul*, 15 *Abb. Pr.* 7; *Lewis v. Fox*, 11 *Abb. Pr.* 134, 281; 20 *How. Pr.* 96.) Where the judgment is in harmony with the pleadings and findings of fact, but erroneous by reason of a variance between the findings and proof, the judgment will not be modified to suit the proof. *Clark v. Huber*, 20 *Cal.* 196.

288. A judgment may be reversed or modified as to any or all of the parties. (*Ricketson v. Richardson*, 26 *Cal.* 149; *Montgomery Bank v. Albany Bank*, 7 *N.Y.* 459; *Giraud v. Beach*, 4 *E. D. Smith*, 27; *Williams v. Christie*, 4 *Duer*, 29; *Fields v. Moul*, 15 *Abb. Pr.* 6.) Or a judgment may be reversed as to part of the amount, and affirmed as to the rest. (*Brownell v. Winnie*, 29 *N.Y.* 400; *Staats v. Hudson River Railroad Co.*, 39 *Barb.* 298; *Pinkney v. Keyler*, 4 *E. D. Smith*, 469; *Rosenbaum v. Gunter*, 3 *Id.* 203; *Fields v. Moul*, 15 *Abb. Pr.* 6; overruling *Kasson v. Mills*, 8 *How. Pr.* 377.) Even when for entire damages. (*Decker v. Hassel*, 26 *How. Pr.* 528; *Fields v. Moul*, 15 *Abb. Pr.* 6.) If only one of two defendants appeal, the judgment may be reversed as to him, and allowed to stand as to others. (*Minturn v. Baylis*, 33 *Cal.* 129; *Ricketson v. Richardson*, 26 *Id.* 149; *Geraud v. Stagg*, 4 *E. D. Smith*, 27; 10 *How. Pr.* 369; overruling *Farrell v. Calkins*, 10 *Barb.* 348.) And costs will be awarded in favor of the one as to whom judgment was

reversed. *Montgomery Co. Bank v. Albany City Bank*, 3 *Seld.* 459.

289. The law regards the *substance* more than the *form*, and the appellate court will compel the court below to issue an attachment to punish a contempt which is in substance a private right, though in form a case of contempt. (*Merced Co. v. Fremont*, 7 *Cal.* 130.) If the judgment is *erroneous*, and the findings of facts will enable the Supreme Court to determine *what kind* of judgment should have been rendered, it will direct the court below to render the proper judgment. (*Love v. Shartzter*, 31 *Cal.* 488.) When an appellate court directs the court below what kind of a judgment to render, it is a reversal of the judgment. (*Agenti v. San Francisco*, 30 *Cal.* 458.) See, as to awarding proper judgment, or modifying judgment when all the facts are before the Court, *Gage v. Brewster*, 31 *N.Y.* 218; *McDougall v. Cooper*, *Id.* 498; *People v. Supervisors of Richmond*, 28 *N.Y.* 112; *Beach v. Cook*, *Id.* 508; *Brownell v. Winnie*, 29 *N.Y.* 400; 29 *How. Pr.* 193; *Re Livingston's Petition*, 34 *N.Y.* 555; 32 *How. Pr.* 20; 2 *Abb. Pr.* 1.

REVERSAL OF JUDGMENT.

290. **Error of Law.**—On an appeal from a judgment, if an error has been committed which may by possibility have prejudiced appellant, judgment must be reversed. *Brown v. Richardson*, 20 *N.Y.* 476; *Erben v. Lorillard*, 19 *Id.* 299; *Williams v. Fitch*, 18 *Id.* 546; *Underhill v. New York and Harlem Railroad Company*, 21 *Barb.* 489; *Worrall v. Parmelee*, 1 *N.Y.* 519; *Weber v. Kingsland*, 8 *Bosw.* 415; *Hahn v. Van Doren*, 1 *E. D. Smith*, 411; *Clark v. Vorce*, 19 *Wend.* 232; *Farmers' and Manfs.' Band v. Whinfield*, 24 *Id.* 419; *Gillet v. Mead*, 7 *Id.* 193; *Clarke v. Dutcher*, 9 *Cow.* 674; *Anthonie v. Coit*, 2 *Hall*, 40.

291. Evidence.—A judgment against clear, uncontradicted, and unimpeached evidence must be reversed. (*Evans v. Wood*, 15 *Abb. Pr.* 416; *Armstrong v. Smith*, 44 *Barb.* 120; *Jacks v. Darrin*, 3 *E.D. Smith*, 557; *Goldsmith v. Obermeier*, *Id.* 121; *Conlan v. Latting*, *Id.* 354; *Orcutt v. Cahill*, 24 *N.Y.* 578; *Fales v. McKeon*, 2 *Hill.* 53; *Fox v. Decker*, 3 *E.D. Smith*, 150.) But the uncontradicted evidence of an interested witness, as a party in the suit, may be disregarded. (*Roberts v. Gee*, 15 *Barb.* 449.) And where judgment was for the defendant, then without considering whether or not the plaintiff proved a case entitling him to relief. (*Reddington v. Waldon*, 22 *Cal.* 185.) Where the evidence is conflicting, the Supreme Court will reverse the order of the court below denying a new trial. *Preston v. Keys*, 23 *Cal.* 193; *Lane v. Brown*, 22 *Ind.* 239.

292. Evidence, Admission of.—If erroneous or illegal evidence is admitted, and the record does not negative the presumption that injury was sustained thereby, the judgment will be reversed. (*Roff v. Duane*, 27 *Cal.* 565; *Lalley v. Wise*, 28 *Cal.* 539; *Worrall v. Parmelee*, 1 *N.Y.* 519; *Hahn v. Van Doren*, 1 *E.D. Smith*, 411; *Marquand v. Webb*, 16 *Johns.* 89; *Osgood v. Manhattan Co.*, 3 *Cow.* 612; *Tappan v. Butler*, 7 *Bosw.* 480; *Main v. Eagle*, 1 *E.D. Smith*, 621; *Hahn v. Van Doren*, *Id.* 411; *Belden v. Nicolay*, 4 *Id.* 14.) Though the defendant did not appear on the trial. (*Squier v. Gould*, 13 *Wend.* 159; *Finch v. McDowell*, 7 *Cow.* 537; *McNutt v. Johnson*, 7 *Johns.* 18; *Lynch v. McBeth*, 7 *How. Pr.* 113.) And so, where judgment was entirely unsupported by evidence. (*Davidson v. Hutchins*, 1 *Hilt.* 123; *Storp v. Harbutt*, 4 *E.D. Smith*, 464; *Hunt v. Westervelt*, *Id.* 225; *Calligan v. Mix*, 12 *How. Pr.* 495; *Howard v. Brown*, 2 *E.D. Smith*, 247; *Wiley v. Slater*, 22 *Barb.* 506; *Fish v. Skirt*, 21 *Id.* 333; *Rathbone v. Stanton*, 6 *Id.* 141.) Or if competent evidence was excluded, which might possibly have changed the result. *McAllister v. Sexton*, 4 *E.D. Smith*, 41; *Raymond v. Richardson*, *Id.* 171; *Tuttle v. Hunt*, 2 *Cow.* 436; *Irvine v. Cook*, 15 *Johns.* 239; *Penfield v. Carpenter*, 13 *Id.* 350; *Haswell v. Bussing*, 10 *Johns.* 128; *Martin v. Garrett*, 4 *E.D. Smith*, 346.

293. Findings.—The Supreme Court will reverse the judgment of the court below, where the facts found by the Court are not sufficient to support the judgment. *Davis v. Caldwell*, 12 *Cal.* 125.

294. Instructions.—For error in refusing to give instructions to

the jury the judgment will be reversed. (*Busenius v. Coffee*, 14 *Cal.* 91; *De Benedetti v. Manchin*, 1 *Hill.* 213.) Or for any error in a charge, which might have misled the jury. (*Pettit v. Ide*, 12 *Abb. Pr.* 44.) Or for error in charge of judge. (*Whitney v. Wells*, 28 *How. Pr.* 150; *Pettit v. Ide*, 12 *Abb. Pr.* 44.) Or for refusal to charge on a proper request. *De Benedetti v. Manchin*, 1 *Hill.* 213; *Halloran v. N.Y. and Erie R.R. Co.*, 2 *E. D. Smith*, 257; see *Needles v. Howard*, 1 *Id.* 54.

295. Irregularities.—A judgment rendered after the time appointed by law for its adjournment will be reversed. *Smith v. Chichester*, 1 *Cal.* 409.

296. Mistrial.—Even though a judgment appears to be correct on the merits, it will be reversed for a mistrial. (15 *How. Pr.* 407; 6 *Abb. Pr.* 129; *Cobb v. Cornish*, 6 *Abb. Pr.* 129; 16 *N.Y.* 602; *Gilbert v. Beach*, *Id.* 606; *Purchase v. Mattison*, 15 *Abb. Pr.* 402.) An order of the court below, setting aside a judgment, where it does not appear that a copy of the order was served on plaintiff or his attorney, will be reversed on appeal. (*Vallejo v. Green*, 16 *Cal.* 160.) A judgment by default will be reversed, unless the record show service on the defendant or appearance. *Schloss v. White*, 16 *Cal.* 65; *Burt v. Sran-ton*, 1 *Cal.* 416; *Joyce v. Joyce*, 5 *Cal.* 449.

297. Pleadings.—If the plaintiff admits in the pleadings that he never had a cause of action, the Supreme Court will reverse the judgment, and either order a judgment in defendant's favor, or remand the cause for further proceedings. (*Mulford v. Estudillo*, 32 *Cal.* 131; *Barron v. Frink*, 30 *Cal.* 486.) Where the complaint fails to state facts sufficient to constitute a cause of action, judgment by default thereon will be reversed on appeal. (*Hallock v. Jaudin*, 34 *Cal.* 167.) The judgment of a court on a second trial, an appeal from the first trial being taken and perfected, will be reversed, because the Court could not proceed with the second trial until the appeal from the order was determined. *Ford v. Thompson*, 19 *Cal.* 118.

298. Reversal, Effect of.—If the judgment is reversed, the parties are remitted to their original rights, and may proceed as though no action had ever been brought. (*Hunt v. Hoboken Land Co.*, 1 *Hill.* 161; *Elbert v. Kelly*, 4 *E. D. Smith*, 12; 10 *How. Pr.* 392.) The reversal of a judgment restores any advantage which may have

been derived from its rendition. (*Reynolds v. Harris*, 14 *Cal.* 667; *Estus v. Baldwin*, 9 *How. Pr.* 80; *Sheridan v. Mann*, 5 *Id.* 201.) Property purchased on sale under judgment reversed must be restored. (*Reynolds v. Harris*, 14 *Cal.* 667.) But otherwise as to a stranger, a *bona fide* purchaser without notice. (*Id.*) The assignee of a judgment, and of the Sheriff's certificate of sale thereunder, stands in the same position as his assignor. *Id.*

WHEN JUDGMENT WILL BE REVERSED. AND NEW TRIAL
ORDERED.

299. A new trial must be ordered whenever it is necessary as a matter of right. (*Griffin v. Marquardt*, 17 *N.Y.* 28.) But not where it is apparent that no possible state of proof applicable to the issues can entitle respondent to a judgment. (*Edmonston v. McCloud*, 16 *N.Y.* 543; *Marquat v. Marquat*, 12 *N.Y.* 336.) In what other cases a new trial must be ordered, *Griffin v. Marquardt*, 17 *N.Y.* 28; *Astor v. L'Amoureux*, 8 *Id.* 107; *Moffet v. Sackett*, 18 *Id.* 522; *Griffin v. Cranston*, 1 *Bosw.* 281; *Meyer v. Louisville*, 7 *Abb. Pr.* 6; *Schenck v. Dart*, 22 *N.Y.* 420; *Chase v. Peck*, 21 *Id.* 581; *Story v. N.Y. and Harlem R.R.*, 6 *N.Y.* 85; *Fields v. Moul*, 15 *Abb. Pr.* 6.

300. On reversing a case, the appellate court may in its discretion award a new trial. (*Griffin v. Marquat*, 17 *N.Y.* 28; *Astor v. L'Amoureux*, 4 *Seld.* 107; *Marquat v. Marquat*, 2 *Kern.* 336; *Moffatt v. Sackett*, 18 *N.Y.* 522; *Schenck v. Dart*, 22 *N.Y.* 420.) Where nothing appears on the record, either in the pleadings, evidence or judgment, from which the Court can ascertain the rights of the parties, and where it is highly probable that the judgment of the court below is

founded neither upon law or equity, the case may be remanded for new trial. *Reed v. Jourdain*, 1 *Cal.* 101.

301. On review of error on the trial, in the process of ascertaining the facts, the proper judgment on reversal will be one ordering a new trial. (*Marquat v. Marquat*, 2 *Kern.* 336; *Astor v. L'Amoureux*, 4 *Seld.* 107; *Edmonston v. McLoud*, 16 *N.Y.* 543; *Griffin v. Marquhardt*, 17 *N.Y.* 28; *Meyer v. City of Louisville*, 26 *Barb.* 609; *Cobb v. Cornish*, 16 *N.Y.* 602; *Irwin v. Lawrence*, 1 *Hilt.* 352; *Moffatt v. Sackett*, 18 *N.Y.* 522.) But where the appellate court can see that no possible state of proof applicable to the case will entitle a party to a recovery, the judgment should be reversed without awarding a new trial. (*Edmiston v. McLoud*, 16 *N.Y.* 543; *Griffin v. Marquhardt*, 17 *N.Y.* 28; *Irwin v. Lawrence*, 1 *Hilt.* 352; *Sayre v. N.Y. and Harlem R.R. Co.*, 3 *Duer*, 54.) Where proper, an absolute reversal may be ordered as to some, and a new trial awarded as to others of the appellants. *Williams v. Christie*, 4 *Duer*, 29.

302. The appellate court may add to the judgment of reversal that the cause be tried *de novo*, or that a particular issue be tried. (*Argenti v. San Francisco*, 30 *Cal.* 458.) The court below allowed to enter judgment for plaintiff for the amount of the verdict, otherwise to re-try the cause. (*Reniff v. The "Cynthia,"* 18 *Cal.* 669.) That an order for a new trial is not "equivalent to a new action," (*United States v. Hawkins*, 10 *Pet. U.S.* 125.) Where judgment is reversed, and a new trial granted, the case goes back for trial on all the issues of fact raised by the pleadings; (*Hidden v. Jordan*, 28 *Cal.* 301;) the parties having the same right

which they originally had. *Sterns v. Aguirre*, 7 *Cal.* 443; *Argenti v. San Francisco*, 30 *Cal.* 458; *Phelan v. San Francisco*, 9 *Cal.* 15.

303. But a new trial will not be awarded where it is evident the party can derive no benefit from it. (*Ferguson v. Turner*, 7 *Mo.* 497.) Nor for an error by which the rights of the party were not prejudiced. (*Kilburn v. Ritchie*, 2 *Cal.* 148; *Tyler v. Green*, 28 *Cal.* 206; *Carpentier v. Gardner*, 24 *Cal.* 160.) Nor where it is clearly seen that after perhaps a protracted litigation the result must be the same. *Tohler v. Folsom*, 1 *Cal.* 213; *Sunol v. Hepburn*, 1 *Cal.* 285; *Smith v. Compton*, 6 *Id.* 26.

304. **Defective Pleading.**—Where on appeal the complaint is so radically defective as not to authorize the judgment, a new trial may be granted, with leave to plaintiff to amend. (*Sterling v. Hanson*, 1 *Cal.* 478.) In cases where Supreme Court, after reversing judgment by default, some of the items of the complaint being illegal, remanded the cause, with liberty to the defendant to set up defense, see *Marriner v. Smith*, 27 *Cal.* 654; *People v. Hager*, 19 *Cal.* 462.

305. **Erroneous Judgment.**—Or where it is probable that the judgment is founded neither upon law nor equity, a new trial will be granted. *Reed v. Jourdan*, 1 *Cal.* 102; *Ross v. Austill*, 2 *Cal.* 183.

306. **Findings.**—Where the findings of the Court are clearly not warranted by the evidence, a new trial should be granted. (*Bolton v. Stewart*, 29 *Cal.* 615.) Where the testimony is all one way, and the finding is contrary to the evidence, a new trial will be granted. (*Lyle v. Rollins*, 25 *Cal.* 440.) Or if the evidence was such that if the question had been submitted to a jury, the Court would set aside the verdict as contrary to the evidence. (*Moore v. Murdock*, 25 *Cal.* 524.) A court has power to set aside the report of a referee and grant a new trial, on the ground that the evidence was insufficient to justify his decision. *Cappe v. Brizzolara*, 19 *Cal.* 607.

307. **In Injunction.**—In a case of injunction and damages,

where the injunction, but not the damages, was allowed, and both parties appeal, the one from the injunction and the other from the order refusing damages, the Court will remand the cause for trial *de novo* on the question of damages. *Jungermann v. Bovee*, 19 *Cal.* 355.

308. Newly Discovered Evidence.—The Supreme Court will not grant a new trial for newly discovered evidence, where the evidence given on the trial is not in the record, as it cannot know how far the new evidence is merely cumulative. *Cowden v. Wade*, 23 *Ind.* 471.

309. State of Excitement.—Where it is manifest that the verdict was given under a state of great excitement, and the court below had refused a new trial, the appellate court will reverse the judgment and order a new trial. *People v. Acosta*, 10 *Cal.* 195.

310. Uncertainty of Law.—Where the merits of the case were not investigated in the lower court, by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act, a new trial was granted. *Speyer v. Ihmels*, 21 *Cal.* 280.

311. Verdict against Evidence.—The Supreme Court will grant a new trial on appeal where the verdict is directly against the evidence. (*Bagley v. Eaton*, 8 *Cal.* 159; *Hill v. Smith*, 32 *Cal.* 166; *Gaster v. Hodgins*, 21 *Ark.* 468.) Or entirely unsupported by the evidence. (*Morris v. Barnes*, 35 *Mo.* 412; *State v. Schneider*, *Id.* 533.) Or where there is no evidence on a point essential to sustain the verdict. (*Cummins v. Scott*, 20 *Cal.* 83.) Or where improper evidence is submitted to a jury, unless the Court can see that such evidence could not possibly have affected the jury prejudicial to the appellant. *Innis v. Steamer "Senator,"* 1 *Cal.* 462.

312. Weight of Evidence.—The Court will not set aside a verdict as being against the weight of evidence, where it does not appear that all the evidence is before it. *McCool v. Galena etc. R.R. Co.*, 17 *Iowa*, 461; *West. Mass. Ins. Co. v. Duffey*, 2 *Kansas*, 347; *Olney v. Chadsey*, 7 *Rhode Island*, 224.

313. Wrong Construction.—Where the complaint, evidence as admitted, the verdict and judgment are all in harmony, but judgment is

erroneous from a wrong construction given to the description of land in a deed in evidence (*Hicks v. Coleman*, 25 *Cal.* 122), a new trial will be granted.

DECISIONS ON APPEAL.

314. A *decision* of the Court is *its judgment*; the opinion is *the reasons* given for that judgment. The *former*, being entered on record immediately, can only be changed upon a petition for rehearing or a modification. The *latter* is the property of the judges, subject to their revision, correction and modification, until it is transcribed on the record with the consent of the writer, when it ceases to be subject of change, except through regular proceedings before the Court by petition. *Houston v. Williams*, 13 *Cal.* 23.

315. All decisions given upon an appeal, in any appellate court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court; but this section shall not apply to actions tried with a jury anew in the County Court, or on appeal from a justice's court. (*Cal. Pr. Act*, § 657.) The Legislature cannot require the Supreme Court to give the reasons of its decisions in writing. The constitutional duty of the Court is discharged by the rendition of its decisions. *Houston v. Williams*, 13 *Cal.* 23.

REHEARING.

316. After judgment has been pronounced in the appellate court, and before the *remittitur* has been sent, a rehearing may be granted. (*Grogan v. Ruckle*, 1 *Cal.* 193.) *Ruse v. Mut. Li. Ins. Co.*, 24 *N.Y.* 653; *Hoyt v. Thompson's Ex'r*, 19 *N.Y.* 207.) Where the judgment was rendered by the Supreme Court in its origina

jurisdiction on an application in *mandamus*, an application for a rehearing will not be entertained, unless a motion for a new trial is made, as in cases arising in the district courts. *People v. Coon*, 25 *Cal.* 635.

317. Motion to Amend.—A motion to amend the judgment of the Supreme Court must be made within the time allowed for filing a petition for rehearing. (*Gray v. Palmer*, 11 *Cal.* 341. A material modification should not be made on such motion; rehearing should be first granted. (*Clark v. Boyreau*, 14 *Cal.* 634; *Argenti v. San Francisco*, 30 *Cal.* 458.) A judgment of affirmance, for failure of the appellant to appear, will be set aside on a rehearing, where actual notice of argument was not given. *Lightstone v. Lawrence*, 2 *Cal.* 106.

318. Points.—On a rehearing, a party will not be permitted to raise any point which was not urged on the first argument. *Grogan v. Ruckle*, 1 *Cal.* 193; *Mount v. Mitchell*, 32 *N.Y.* 702.

319. Practice on Rehearing.—The petition filed must include all grounds on which the rehearing is claimed; those not included are deemed waived. (*Wilson v. Broder*, 24 *Cal.* 190; *Mount v. Mitchell*, 32 *N.Y.* 702.) Such petitions are not now allowed in California, except in criminal cases. The employment of new counsel after decision rendered is no ground for an extension of time for filing a petition for a rehearing. *Ferris v. Coover*, 10 *Cal.* 589.

320. When it will be Granted.—When no copy of appellant's briefs was served upon respondent, and the Court decides the case against him without any brief on his part, a rehearing will be granted on application. (*Patterson v. Ely*, 19 *Cal.* 28.) By the recent rules of the Supreme Court of California, no petition for rehearing is allowed except in criminal causes. It is doubtless true that petitions for rehearing had become a nuisance, yet it will require extraordinary care not to sometimes overlook some vital points in the case, and when this occurs a rehearing is important.

321. When not Granted.—When there was a conflict of evidence, plaintiff and defendant being the only witnesses, motion for rehearing was denied. (*Fisher v. Merwin*, 25 *How. Pr.* 284.) An equal division of the justices of the Supreme Court, upon the question of granting a rehearing, is a denial thereof. *Ayres v. Bensley*, 32 *Cal.* 632.

CHAPTER VI.

REMITTITUR.

322. The cause having been finally disposed of in the highest court in the State, a *remittitur* is sent down instructing the court below as to the nature of such decision, and judgment is entered up accordingly; or if a new trial is ordered, the cause again takes its place upon the District Court calendar; or if the judgment is ordered modified, an order is entered in the court below, showing the nature of the modification, and it then becomes and is a final judgment. Such entry of judgment on *remittitur* can be made in vacation, the act of the Clerk in entering being merely ministerial. *McMillan v. Richards*, 12 *Cal.* 467; *Dale v. Rosevelt*, 1 *Went.* 25.

323. If it award a new trial, the Clerk will place the cause on the calendar. (*Marysville v. Buchanan*, 3 *Cal.* 212.) In New York, it would seem, the practice is different; there the matter must be presented to the Court on motion, and a suitable order applied for. *Union India Rubber Co. v. Babcock*, 4 *Duer*, 620; 1 *Abb. Pr.* 262.

324. When the *remittitur* has been duly and regularly issued from the Supreme Court, and filed in the court below, the Supreme Court loses all jurisdiction over the case; (*Blanc v. Bowman*, 22 *Cal.* 23; *Latson*

v. Wallace, 9 *How. Pr.* 334; *Legg v. Overbagh*, 4 *Wend.* 188; *Delaplaine v. Bergen*, 7 *Hill*, 591; *Dresser v. Brooks*, 2 *N.Y.* 559; *Martin v. Wilson*, 1 *N.Y.* 240; *Burckle v. Luce*, *Id.* 239; *Frazer v. Western*, 3 *How. Pr.* 235;) except in cases of the dismissal of an appeal obtained by fraud. (*Rowland v. Kreyenhagen*, 24 *Cal.* 52.) A motion, therefore, to vacate a judgment, on the ground that it was not rendered by the proper members of the Court, cannot be entertained after the *remittitur* has been filed below. (*Blanc v. Bowman*, 22 *Cal.* 23.) But the appellate court does not lose its jurisdiction while the order of dismissal is retained in counsel's hands. (*Thompson v. Blanchard*, 2 *N.Y.* 561.) Nor until it is filed in the court below. (*Burckle v. Luce*, 1 *N.Y.* 239.) But may modify it while *in transitu*. *Hosack v. Rogers*, 7 *Paige*, 108.

325. Where the *remittitur* was irregular, by default taken contrary to stipulation, the Court recalled the papers. (*Chamberlain v. Fitch*, 2 *Cow.* 243; *Walters v. Travis*, 8 *Johns.* 566; *Newton v. Harris*, 8 *Barb.* 305; *Palmer v. Lawrence*, 1 *Seld.* 455.) A *remittitur* is proper whenever any order is made which finally disposes of the appeal, though it may not be an order on the merits. (*Dresser v. Brooks*, 2 *N.Y.* 559; 4 *How. Pr.* 207; *Langley v. Warner*, 2 *N.Y. Code R.* 97.) But not unless a return is filed in the appellate court, as without such there could be nothing to remit on the dismissal of the appeal. (*Doty v. Brown*, 4 *How. Pr.* 429.) A certified copy of the order of dismissal is all that is necessary. (*Thompson v. Blanchard*, 4 *How. Pr.* 211.) Where an appeal is taken from a judgment, and from an order, and the appeal is dismissed as to the order only, a *remittitur* sending back

the judgment is irregular. *McFarlan v. Watson*, 4 *How. Pr.* 128; *Dresser v. Brooks*, 2 *N.Y.* 559.

326. Amendment.—But it may be amended by motion in the court above, in respect to a clear inaccuracy, as of miscalculation, etc. (*Palmer v. Lawrence*, 5 *N.Y.* 455; *Griswold v. Havens*, 26 *How. Pr.* 170.) Or proceedings may be stayed by the court below, on suggestion from the court above, but not otherwise. (*Jarvis v. Shaw*, 16 *Abb. Pr.* 415; *Selden v. Vermilya*, 3 *Sandf.* 683; *Bogardus v. Rosendale Manf. Co.*, 1 *Duer*, 592.) Or the *remittitur* might be vacated, if irregularly entered, or entered upon false affidavits. *Newton v. Harris*, 8 *Barb.* 306.

327. Attached to Judgment.—The *remittitur* is to be attached by the Clerk of the lower court to the judgment roll, and a minute of the judgment entered on the docket against the original entry; the judgment then stands as the judgment of the lower court. *Marysville v. Buchanan*, 3 *Cal.* 212.

328. Costs.—On a total affirmance or reversal, the costs follow the decision, and the prevailing party is entitled to them. (*White v. Anthony*, 23 *N.Y.* 164.) The words "with costs" added to the judgment, and annexing to the *remittitur* a copy of the bill of costs, are a sufficient awarding of costs. (*Marysville v. Buchanan*, 3 *Cal.* 212.) The Clerk of the District Court may thereupon issue execution for costs. (*Marysville v. Buchanan*, 3 *Cal.* 212; affirmed in *McMillan v. Visser*, 14 *Cal.* 232; 20 *Cal.* 350; *Ex parte Burrill*, 24 *Cal.* 350.) The Court has power of awarding, in addition to the costs upon affirmance, a further sum for damages caused by the delay. (*Wolf v. Van Nostrand*, 4 *How. Pr.* 208.) The *remittitur* may order costs of appeal, to abide the event of a new trial. (*Marsh v. Benson*, 34 *N.Y.* 358.) Defendants below and appellants here, on the main question, to wit, the injunction, required to pay costs in this Court on both appeals. *Jungerman v. Bovee*, 19 *Cal.* 355.

329. Filing.—The *remittitur* may be filed at any time before execution issues, and a rule is not necessary. *Lyon v. Burtis*, 2 *Cow.* 510.

330. Law of the Case.—A decision of the Supreme Court in a case becomes the law of that case in all its future stages; (*Davidson v.*

Dallas, 15 *Cal.* 75; Marysville *v.* Buchanan, 3 *Cal.* 212; Hubbard *v.* Sullivan, 18 *Cal.* 508; Soule *v.* Ritter, 20 *Id.* 522; Leese *v.* Clarke, *Id.* 387; Nieto *v.* Carpenter, 21 *Cal.* 455; Table Mt. Tun. Co. *v.* Stranahan, *Id.* 548; Mitchell *v.* Davis, 23 *Cal.* 381; Moore *v.* Murdock, 26 *Cal.* 524; Lucas *v.* San Francisco, 28 *Id.* 591; Estate of Pacheco, 29 *Id.* 224; Mulford *v.* Estudillo, 32 *Cal.* 131; Kile *v.* Tubbs, 32 *Cal.* 332; Argenti *v.* Sawyer, *Id.* 414;) whether decision be erroneous or not. (Davidson *v.* Dallas, 15 *Cal.* 75; Mulford *v.* Estudillo, 32 *Id.* 131; Gunter *v.* Laffan, 7 *Cal.* 558; Clary *v.* Hoagland, 6 *Cal.* 685.) And cannot on a second appeal be altered or changed; (Clary *v.* Hoagland, 6 *Cal.* 685;) unless the conditions on which it was founded are so changed as to render its accomplishment impracticable. Estate of Pacheco, 29 *Cal.* 224; Mitchell *v.* Davis, 23 *Cal.* 381.

331. Law of the Case.—And such decision is conclusive on the rights of the parties, and is not subject to revision. (Dewey *v.* Gray, 2 *Cal.* 274; Soule *v.* Ritter, 20 *Cal.* 522; Leese *v.* Clark, 20 *Cal.* 387.) And is a final adjudication, from which the Court cannot depart, nor the parties relieve themselves. (Phelan *v.* San Francisco, 20 *Cal.* 39; Lucas *v.* San Francisco, 28 *Cal.* 591; Gunter *v.* Laffan, 7 *Cal.* 587.) The discussion and determination of other points, not tending to the decision of the point upon which the appeal was disposed of, must be regarded as dicta, and not as the law of the case. (Mulford *v.* Estudillo, 32 *Cal.* 131.) The doctrine of the law of the case applies equally to actions of ejectment as to other actions, and without consideration as to the importance of the questions involved. (Leese *v.* Clark, 20 *Cal.* 387.) Where an appeal is taken from an order granting a preliminary injunction, and the order is reversed, the opinion of the Court will not apply to any new state of facts which may appear on the record or an appeal from the final judgment. Trinity Co. *v.* McCammon, 25 *Cal.* 119.

332. Proceedings Subsequent.—If the Supreme Court directs the judgment of the court below to be modified, the court below cannot open it so as to change it in any particular than as directed. (Meyer *v.* Kohn, 33 *Cal.* 484.) Nor can the court below refuse to give effect to the judgment of the appellate court. (McMillan *v.* Richards, 12 *Cal.* 467.) The court below has no authority to prevent the immediate execution of the judgment so remitted. (Marysville *v.* Buchanan, 3 *Cal.* 212; McMillan *v.* Richards, 12 *Id.* 467.) Nor has the lower

court the power to modify the judgment so remitted. *Argenti v. San Francisco*, 30 *Cal.* 458; *Meyer v. Kohn*, 33 *Cal.* 484; *Rogers v. Paterson*, 4 *Paige*, 409; *Griswold v. Havens*, 16 *Abb. Pr.* 413; *Quackenbush v. Leonard*, 10 *Paige*, 131; *McGregor v. Buell*, 17 *Abb. Pr.* 31.

333. Restitution.—Where final judgment is rendered for appellant, the Court should exercise the power of restitution. (*Estus v. Baldwin*, 9 *How. Pr.* 80; see *Britton v. Phillips*, 24 *How. Pr.* 111.) The power of restitution existing in the Supreme Court does not exclude the lower courts from exercising the same power. (*Reynolds v. Harris*, 14 *Cal.* 667.) This does not cover the case of a judgment for the recovery of money. It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed; as, by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like. (*Farmer v. Rogers*, 10 *Cal.* 335.) A motion for restitution should be made before the entry of judgment, of which it then becomes a part. *Kennedy v. O'Brien*, 2 *E. D. Smith*, 41; *Lott v. Swezey*, 29 *Barb.* 87.

334. Stay of Proceedings.—The presiding judge of the highest court in a State has no power to grant a stay of proceedings on a judgment rendered in that Court, until an application can be made to some justice of the Supreme Court of the United States to issue citation on a writ of error. *Greely v. Townsend*, 25 *Cal.* 614.

335. When to Issue.—No *remittitur* shall issue until after the expiration of time allowed by the last rule to file a petition for rehearing, unless otherwise ordered by the Court. *Cal. Sup. Ct. Rule*; *Lyme v. Ward*, 1 *N.P.* 531.

CHAPTER VII.

APPEALS FROM COUNTY COURT AND PROBATE COURT, TO THE SUPREME COURT.

336. Appeals may also be taken to the Supreme Court from the County Court, from a *final judgment* thereof, in the following cases: *First*, In an action of forcible entry and detainer. *Second*, In an action to prevent or abate a nuisance. *Third*, In a proceeding in insolvency. *Fourth*, In an action wherein the legality of any tax, impost, assessment, toll or municipal fine is in question. *Fifth*, In any special case within the appellate jurisdiction of the Supreme Court, in which the County Court may exercise jurisdiction. Or from CERTAIN ORDERS: *First*, From an order granting or refusing a new trial. *Second*, From an order granting, or dissolving, or refusing to grant or dissolve an injunction. *Third*, From any special order made after final judgment in the above cases. *Cal. Pr. Act*, § 359.

NOTE.—The proceedings in insolvency above referred to are now done away with by the U.S. Bankrupt Act.

FROM THE PROBATE COURT TO THE SUPREME COURT.

337. An appeal may be taken to the Supreme Court from an *order, decree, or judgment* of the Probate Court, when the estate or amount in dispute exceeds two hundred dollars (now three hundred dollars), in the follow-

ing cases: *First*, For or against granting or revoking letters testamentary, or of administration, or of guardianship. *Second*, For or against admitting a will to probate. *Third*, For or against the validity of a will, or revoking the probate thereof. *Fourth*, For or against setting apart property, or making an allowance for a widow or child. *Fifth*, For or against directing the sale or conveyance of real property. *Sixth*, On the settlement of any account of an executor or administrator or guardian. *Seventh*, For or against declaring, allowing, or directing the payment of a debt, claim, legacy, or distributive share. (*Laws of Cal.* 1855, p. 301; *Belknap's Probate Law*, p. 159.) But an order of the Probate Court, setting aside a judgment of that court refusing to admit a will to probate, is not appealable. *Peralta v. Castro*, 15 *Cal.* 511.

338. Contested Elections.—The Supreme Court has jurisdiction on appeal in contested election cases. *Knowles v. Yeates*, 31 *Cal.* 82; *Day v. Jones*, 31 *Cal.* 261; *Webster v. Byrnes*, 34 *Cal.* 273.

339. Hearing.—Appeals from the County Court are brought to a hearing in the same manner as appeals from the District Court. *Cal. Pr. Act*, § 361.

340. How Taken and Perfected.—An appeal shall be taken and perfected by notice and undertaking, with security, in the same manner and to the same extent as upon appeal from the District Court to the Supreme Court. (*Laws of Cal.* 1855, p. 301.) Executors and administrators, having given an official bond, may make appeal effectual without filing undertaking. *Id.*

341. Injunction.—Or from an order granting or refusing an injunction. *Natoma Wat. and Min. Co. v. Parker*, 16 *Cal.* 83.

342. Jurisdiction.—In California, district courts have no appellate jurisdiction. (*People v. Peralta*, 3 *Cal.* 379; *Hernandez v. Simon*, *Id.* 464; *Caulfield v. Hudson*, 3 *Id.* 389; *Grey v. Schupp*, 4 *Id.* 185; *Reed v. McCormick*, *Id.* 342; *Townsend v. Brooks*, 5 *Id.* 52.) 'There

is no relation of inferiority in the constitution or powers of the Probate Court as respects the District Court, which are unlike, but within their respective spheres equal. No appeal lies from the one to the other. *Pond v. Pond*, 10 *Cal.* 495.

343. Practice and Procedure.—The provisions of the Practice Act, so far as the same do not conflict with the Probate Act, shall be applicable to appeals from the Probate Court. *Laws of Cal.* 1853, p. 301; *Peralta v. Castro*, 15 *Cal.* 511.

344. Special Proceedings.—Or in proceedings in condemnation of land. *S. F. and S. J. R.R. Co., v. Mahoney*, 22 *Cal.* 112; *Hicks v. Michael*, 15 *Cal.* 107.

345. Statement.—A statement may be prepared and filed within twenty days after entry of the order, decree or judgment. (15 *Cal.* 511.) Section three hundred and thirty-eight of the Practice Act applies to statements on appeal from the probate courts. (*Estate of Boyd*, 25 *Cal.* 511.) The statement must state specifically the particular errors or grounds upon which the appellant intends to rely. *Id.*

346. Time in which to Appeal.—Appeals must be taken within sixty days after the order, decree or judgment is made and entered in the minutes of the Court. *Laws of 1855*, p. 301; *Belknap's Pro. L.* 160.

347. Transcript.—On an appeal from a decree of a probate court on a final accounting and settlement, the petition and account filed with a view to the final settlement are a part of the record to be used on appeal. *Estate of Isaacs*, 30 *Cal.* 105.

348. Who may Appeal.—Either party shall be entitled to appeal for error committed in settling the issues, or for errors occurring at the trial of such issues, or in rendering judgment, as in other civil actions. *Laws of 1867-8*, p. 629.

CHAPTER VIII.

APPEALS FROM JUSTICES' COURTS, AND OTHER JUDICIAL OR QUASI JUDICIAL SOURCES, TO COUNTY COURTS.

349. Any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the County Court. (*Cal. Pr. Act*, § 624.) County courts have sole appellate jurisdiction in such cases. (*People v. Fowler*, 9 *Cal.* 85; *Denmark v. Liening*, 10 *Id.* 93; *Hunter v. Hoole*, 17 *Cal.* 418; *Comstock v. Clemens*, 19 *Cal.* 77; *Ricks v. Reed*, *Id.* 551.) A justice of the peace has jurisdiction to grant appeals to the County Court. (*Coulter v. Stark*, 7 *Cal.* 244.) And such appeals are a bar to the remedy by *certiorari*. (*Gray v. Scapp*, 4 *Cal.* 185; *Coulter v. Stark*, 7 *Id.* 244; *Clary v. Hoagland*, 13 *Id.* 173; *People v. Shepard*, 28 *Cal.* 115.) But if the time for appeal has elapsed, plaintiff can apply to the County Court for a writ of *certiorari*, and thus review the action of the justice in rendering the judgment so far as questions of jurisdiction are concerned. *Comstock v. Clemens*, 19 *Cal.* 77; *People v. Johnson*, 30 *Cal.* 98.

350. Appellate Jurisdiction Presumed.—If it does not affirmatively appear that a superior court has no jurisdiction, its jurisdiction will be presumed. (*Hahn v. Kelly*, 34 *Cal.* 391.) To give jurisdiction, the amount in dispute, exclusive of costs and percentage, must exceed two hundred dollars (now \$300). *Zabriskie v. Terry*, 20 *Cal.* 173; *Votan v. Reese*, 20 *Cal.* 86; *Dunphy v. Guidon*, 13 *Id.* 28; see *Meeker v. Harris*, 23 *Cal.* 285.

351. Costs.—One of the conditions upon which an appeal is allowed from justices' courts is the payment of the costs of the motion. (McDermott *v.* Douglas, 5 *Cal.* 89.) And offer to pay costs as soon as the papers are made out is not a sufficient tender. (People *v.* Harris, 9 *Cal.* 571.) The justice is not bound to first make out the papers, and then rely on his fees being paid. (People *v.* Harris 9 *Cal.* 571.) But may do so if he so elect. (Lick *v.* Madden, 25 *Cal.* 203.) And he must make a demand for his fees. Lick *v.* Madden, 25 *Cal.* 203.

352. Jurisdiction.—The objection that a county court has no jurisdiction in cases of appeal to it from a lower court, where no bond is given as required by statute, should be made in the County Court, as the Judge thereof, in his discretion, on hearing excuse, might allow appellant to file a bond. (Howard *v.* Harman, 5 *Cal.* 78.) So, also, the allowance of an amendment to the complaint is in the discretion of the County Court. (Canfield *v.* Bates, 13 *Cal.* 606.) As to jurisdiction of Justice of Peace to grant appeals, see Coulter *v.* Stark, 7 *Cal.* 244.

353. Mandamus.—Appellant may be allowed opportunity to move to compel Justice to send up the record on appeal. (Sherman *v.* Rolberg, 9 *Cal.* 17.) Where an alternative *mandamus* was issued to a Justice to compel him to send up papers, to which he answered that his fees had not been paid or tendered: *Held*, his answer is no defense to the writ, as the fees may have been paid since the service of the writ. People *v.* Harris, 9 *Cal.* 571.

354. Mode of Appeal.—In Nevada, the mode of appeal from Justices' Courts to District Courts may be by trial *de novo*, or a mere review of the Justice's proceedings, as the Legislature may choose to direct. Cavanaugh *v.* Wright, 2 *Nev.* 166.

355. Statement.—The party appealing, on questions of law alone, shall prepare a statement on appeal within ten days from the rendition of judgment, and file the same with the Justice. (*Cal. Pr. Act*, § 625; People *ex rel.* Jones *v.* County Court of El Dorado, 10 *Cal.* 19.) And the statement must contain the grounds on which appellant intends to rely, and so much of the evidence as may be necessary to sustain the grounds, and no more. (*Id.*; People *v.* Freelon, 8 *Cal.* 517.) When the appeal is on questions of fact, or of both law and fact, he sends up no statement. People *v.* Freelon, 8 *Cal.* 517.

355. Transcript.—Upon the appeal, the Justice shall transmit the case to the County Court. (*Cal. Pr. Act*, § 627.) The transcript, when appeal is from questions of law alone, consists of a statement, with a copy of the docket, and all motions filed by the party during the trial, the notice of appeal and the undertaking on appeal. (*People v. Freelon*, 8 *Cal.* 517.) The appellant shall furnish the papers for the Supreme Court, in the same manner as upon appeals from the District Court. *Cal. Pr. Act*, § 362.

356. Transfer of Case.—A county court, on an appeal from a judgment in a justice's court, in a case where the ownership of real property is involved, may order the case transferred to the District Court for trial. *Cullen v. Langridge*, 17 *Cal.* 67.

357. When an Appeal will Lie.—Appeals may be taken on questions of law, or on questions of law and fact. (*Cal. Pr. Act*, § 366.) From a judgment rendered, in an action brought to recover a penalty for overcharge, under the Act of April, 1863, concerning street railroads. (*Burson v. Cowles*, 25 *Cal.* 535.) But an appeal from a justice's court will not lie from a judgment by default; (*People v. County Court of El Dorado*, 10 *Cal.* 19;) as there was in the case no issue of facts. (*Id.*) An appeal does not lie from an order made by a justice directing stolen property to be delivered to the owner. *People v. Halloway*, 26 *Cal.* 651.

No. 1048.

Notice of Appeal.

State of California, }
City and County of } In the Justice's Court.

[TITLE.]

You will please take notice, that the plaintiff in the above entitled action hereby appeals to the County Court of the City and County of, from the judgment therein made and entered in the said Justice's Court, on the day of, 18.., in favor of

said defendant, and against said plaintiff, and from the whole of said judgment. This appeal is taken on questions of both law and fact.

[SIGNATURE.]

[DATE.]

To J. P., Justice of said Justice's Court,
and G. H., Attorney for Defendant.

358. Filing Notice.—The filing of notice of appeal and undertaking on appeal, in a justice's court, after rendition of the verdict, but before entry of judgment, does not deprive the Justice of authority to enter up judgment on the verdict. *Fugitt v. Cox*, 2 *Nev.* 370.

359. Service of Notice.—The general law regulating appeals, which provides that notice may be served on the party or his attorney, must govern cases arising in justices' courts. (*Welton v. Garribaldi*, 6 *Cal.* 245.) The record not showing that notice was served, appellant may prove by his affidavit that such notice was in fact served. *Mendioca v. Orr*, 16 *Cal.* 368.

360. What is Essential.—In Oregon, appeals may be taken from justices' courts to circuit courts. The filing of notice of appeal with the Justice, and serving a copy on the adverse party, also filing and executing a sufficient bond, are conditions precedent to an appeal. (*Whipley v. Mills*, 9 *Cal.* 641; *Strang v. Keith*, 1 *Oregon*, 312.) The filing and service of notice, and filing and execution of bond with the Justice of the Peace, must be complied with within twenty days after rendition of judgment. *Strang v. Keith*, 1 *Oregon*, 312.

361. Written Notice.—In Missouri, a written notice is required in appeals from justices' courts, which must be served on the opposite party. (*Tiffin v. Millington*, 3 *Mo.* 418; *Hempstead v. Darby*, 2 *Id.* 25; *Cochran v. Bird*, *Id.* 141; *Hayton v. Hope*, 3 *Id.* 53.) Verbal notice or reading notice is not sufficient. (*Hempstead v. Darby*, 2 *Mo.* 25; *Newbury v. Melton*, 3 *Mo.* 121.) But a notice signed and given by an agent is sufficient. (*Runkle v. Hagan*, 3 *Mo.* 234.) And notice must be served within the statutory time. *Newbury v. Melton*, 3 *Mo.* 121.

*No. 1049.**Undertaking on Appeal.*

[TITLE.]

KNOW ALL MEN BY THESE PRESENTS:

That we, A.B., principal, and C.D. and E.F., sureties, are held and firmly bound unto G.H., in the sum of dollars, lawful money of the United States of America, to be paid to the said G.H., [his] executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of, 18...

The condition of the above undertaking is such, that whereas the said G.H. obtained a judgment against the said J.K., before J.P., Esq., Justice of the Peace of the Township, in the County of, State of, on the day of, 18..., for dollars principal sum, and for dollars costs, and whereas the above bounden is desirous of appealing from the decision of said Justice to the County Court of the said County of, and a stay of proceedings is claimed: Now, if the above bounden shall well and truly pay, or cause to be paid, the amount of the said judgment and all costs, and obey any order the said County Court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment and all costs that may be recovered against the said appellant in the said County

Court, and obey any order the said Court may make therein, then this obligation to be null and void; otherwise to remain in full force and virtue.

[SIGNATURES AND SEALS.]

[*Justification.*]

362. Approval of Justice.—It is the duty of the Justice of the Peace, when an appeal bond is presented, to act without delay. If he receives the bond without objection, it will be too late to disapprove it the next day. *People v. Harris*, 9 *Cal.* 571.

363. Bond.—Where objection is made within the proper time, for want of an undertaking or for insufficiency thereof, it is the duty of the presiding Judge to hear the excuse of the party failing to produce it, and, if sufficient, to allow him to file a bond. (*Howard v. Harman*, 5 *Cal.* 78.) Or he may be allowed to amend. (*Cunningham v. Hopkins*, 8 *Cal.* 33.) If the bond be void or defective, a new bond may be filed on terms. *Rabe v. Hamilton*, 15 *Cal.* 31.

364. Justification.—Security shall be given and justification of sureties, to the same extent and with the same effect as in appeals from the District Court. (*Cal. Pr. Act*, § 360.) A party who excepts to the sufficiency of sureties may waive the justification. *Blair v. Hamilton*, 32 *Cal.* 49.

365. Undertaking to Effect Stay.—To effect a stay of proceedings, the sureties must justify in a sum equal to twice the amount of the judgment, or twice the value of the property, including costs. *Cal. Pr. Act*, § 628.

PART TWELFTH.

FINAL PROCESS.

CHAPTER I.

EXECUTION.

No. 1050.

Form of Writ.

[TITLE.]

The People of the State of California,

To the Sheriff of the County of,
greeting:

Whereas, on the day of, 18.., A. B.,
plaintiff, recovered a judgment in the said District Court
of the Judicial District of the State of
....., in and for the County of,
against C.D., for the sum of dollars damages,
with interest at the rate of per cent. per,
till paid, together with costs and disbursements at the
date of said judgement, and accruing costs, amounting
to the sum of dollars, lawful money of the
United States, as appears to us of record.

And whereas, the judgment roll in the action in which
said judgment was entered is filed in the Clerk's office

of said Court, in the County of, and the said judgment was docketed in said Clerk's office in the said County, on the day and year first above written.

And the sum of dollars, with interest thereon, is now (at the date of this writ) actually due on said judgment.

Now you, the said Sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment, out of the personal property of said debtor; or, if sufficient personal property of said debtor cannot be found, then out of the real property in your County belonging to him on the day whereon said judgment was docketed in the said City and County, or at any time thereafter, and make return of this writ within sixty days after your receipt thereof, with what you have done indorsed hereon.

Witness, Hon., Judge of the said Judicial District of the State of California, at the Court House in the County of, this day of, 18...

Attest my hand and the seal of said Court, the day and year last above written.

K.L.,

Clerk.

By O.P.,

Deputy Clerk.

1. Counties.—No execution can issue upon a judgment rendered against a county. When a judgment is rendered against a county, as to duty of supervisors, see *Emeric v. Gilman*, 10 *Cal.* 404.

2. Enforcement of Money Judgment.—When the judgment requires the payment of money or the delivery of real or personal property, the same may be enforced by a writ of execution. *Cal. Pr. Act*, § 213.

3. Form of Writ.—The writ of execution shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the Clerk, and shall be directed to the Sheriff, and shall intelligibly refer to the judgment, stating the court, the county, where the judgment roll is filed, and if it be for money, the amount thereof and the amount actually due thereon, and the kind of money or currency in which the judgment is payable. (*Cal. Pr. Act*, § 210.) An execution must be warranted by the judgment. If it exceeds the judgment, it has no validity. *Davis v. Robinson*, 10 *Cal.* 411.

4. Execution for Costs.—Whenever costs are awarded to a party by an appellate court, such party may have an execution for the same, on filing a *remittitur* with the clerk of the court below; and it shall be the duty of such Clerk, whenever the *remittitur* is filed, to issue the execution upon application therefor; and whenever costs are awarded to a party by an order of any Court, such party may have an execution therefor in like manner as upon a judgment. (*Cal. Pr. Act*, § 665; *Marysville v. Buchanan*, 3 *Cal.* 212; *McMillan v. Visher*, 14 *Cal.* 241.) On reversal of judgment in the Supreme Court, *Ex parte Burrill*, 24 *Cal.* 350.

5. Execution for Deficiency on Sale.—Five years of limitation, within which an execution for an unsatisfied balance on a foreclosure sale may be taken out, runs from the date when the balance was docketed. (*Bowers v. Crary*, 30 *Cal.* 621.) The docketing of a balance remaining due after sale of mortgaged property is not an entry of a new judgment for such balance. (*Id.*) Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds, and execution against the property of the husband for any deficiency, and after the entry of the decree the husband died: *Held*, that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. *Cowell v. Buckelew*, 14 *Cal.* 640.

6. Irregular Issuance.—The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ. (*Gregory v. Ford*, 14 *Cal.* 143.) As to relief from irregular issuance and from void execution, consult *Ryan v. Daly*, 6 *Cal.* 239; *Solomon v. Maguire*, 29 *Cal.* 227; *Domec v. Stearns*, 30 *Cal.* 114.

7. Levy, Effect of.—A levy under an execution, upon sufficient personal property to satisfy the same, is a satisfaction of the judgment, sufficient at least to discharge third persons who are liable collaterally or as sureties therefor; and the release of the property from levy thus made, without consent of the parties thus liable, cannot revive their liability. 8 *Cal.* 30; *Mulford v. Estudillo*, 23 *Cal.* 94.

8. Levy, how Made.—A levy on personal property capable of manual delivery must be made by taking the property in custody. (*Dutertre v. Driard*, 7 *Cal.* 549.) A levy may be good as against the defendant in the writ, and not good as to third persons. (*Taffits v. Manlove*, 14 *Cal.* 47.) As to third persons, there can be no levy when the officer does not know the subject of the levy; as, where he stands at the door of a store which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession. (*Heron v. Hughes*, 25 *Cal.* 563.) See, as to levy, (*Smith v. Randall*, 6 *Cal.* 47.) A levy under execution, on sufficient property to satisfy it, is a satisfaction of the judgment. *People v. Chisholm*, 8 *Cal.* 29; 32 *Cal.* 131.

9. Return of Sheriff.—The fact that the officer had failed to expressly state a levy in his return was no reason why the return should be excluded. A purchaser at a sheriff's sale does not depend in any respect for his title upon the return of the Sheriff. He is only bound to see that there is a judgment which is not void, and an execution which is regular upon its face, and the acts of the officer may be presumed to be regular; (*Blood v. Light*, *Cal. Sup. Ct.*, *Oct. T.*, 1869; citing *Cloud v. El Dorado Co.*, 12 *Cal.* 133; *Clark v. Lockwood*, 21 *Id.* 224;) the Statute being directory so far as it deals with the manner in which the officer is required to execute the writ. (*Smith v. Randall*, 6 *Cal.* 50; *Webber v. Cox*, 6 *Monr.* 110; *Hayden v. Dunlap*, 3 *Bibb.* 216; cited in *Blood v. Light*, *Cal. Sup. Ct.*, *Oct. T.*, 1869.) Moneys collected in execution are usually paid over by the officer before the return of the writ, and the fact of such payment constitutes a part

of the return, and if paid, the amount collected and paid over cannot be the measure of damages for a subsequent failure to return the writ, where the *gravamen* of the action is the failure to return an execution within the prescribed time. *Hoag v. Warden, Cal. Sup. Ct., Jul. T., 1869.*

9. Return, Amendment of.—Courts should exercise great liberality in allowing sheriffs to amend their returns, so as to make them conform to the true state of facts, and to correct errors and mistakes. (*Gavitt v. Doub, 23 Cal. 78.*) But it cannot be amended so as to postpone the rights of creditors attaching subsequently but before the correction. (*Newhall v. Provost, 6 Cal. 87; Webster v. Haworth, 8 Cal. 25.*) The time in which a sheriff makes return to an execution does not affect the validity of the execution or of a sale under it. *Low v. Adams, 6 Cal. 227.*

10. Return Conclusive.—A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion. (*Egery v. Buchanan, 5 Cal. 56.*) For the presumptions are in favor of the regularity of the acts of the officers. (*Ritter v. Scannell, 11 Cal. 248.*) Courts cannot know an under officer, and the act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce v. Joyce, 5 Cal. 449; Rowley v. Howard, 23 Cal. 401.*

11. Stay of Execution.—A judge at chambers has authority to order a suspension of proceedings under an execution, until a motion before the Court to recall or quash it can be heard. (*Sanchez v. Carriaga, 31 Cal. 170.*) If a judgment upon which an execution issues, and the execution itself, are void upon their face, the Court has power, on motion, to afford relief, and can arrest the process. *Sanchez v. Carriaga, 31 Cal. 170; see, also, Mok. Hill Co. v. Woodbury, 10 Cal. 188; Isaac v. Swift, 10 Cal. 71; Farmer v. Rogers, Id. 335; Logan v. Hillegas, 16 Cal. 200; Matoon v. Eder, 6 Cal. 60.*

12. When Execution may Issue.—The party in whose favor judgment is given may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter. (*Cal. Pr. Act, § 209; N.Y. Code, § 283.*) As soon as the judgment is entered, an execution may issue, whether the judgment

roll has been made up or not. (*Sharp v. Lumley*, 34 *Cal.* 611.) Every process which may be required to completely enforce a judgment must be taken within five years after its entry. (*Bowers v. Crary*, 30 *Cal.* 621.) It applies as well to justices' judgments. (*White v. Clark*, 8 *Cal.* 513.) And to judgments of foreclosure of mortgage equally with personal judgments. (*Stout v. Macy*, 22 *Cal.* 647.) Or for an unsatisfied balance on foreclosure. (*Bowers v. Crary*, 30 *Cal.* 621.) The period during which an execution has been stayed by an order of Court is not to be excluded from the five years after the lapse of which an order of Court was necessary to obtain an execution. *Solomon v. Maguire*, 29 *Cal.* 227.

13. Who may Issue.—The Clerk can also issue execution for damages and costs. (*McMillan v. Visser*, 14 *Cal.* 232.) So, where a case is remitted from the Supreme Court to a district court, the Clerk of the latter may issue an execution for the costs accrued thereon, without the order of the District Court; nor can the District Court prevent the immediate execution of the judgment. (*City of Marysville v. Buchanan*, 3 *Cal.* 213.) See, as to issuance in another County, *People v. Doe*, 31 *Cal.* 220.

14. Writ, how Executed.—The general Statute defines the duties of the Sheriff in respect to final process. It declares "that the Sheriff shall execute the writ (of *fiery facias*) by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess, he shall return the same to the judgment-debtor." These acts are to be construed in *pari materia*. (*Wilson v. Broder*, 10 *Cal.* 486.) The Statute is directory, so far as it deals with the manner in which the officer is required to execute the writ; (*Smith v. Randall*, 6 *Cal.* 50; *Webber v. Cox*, 6 *Monroe*, 110; *Hayden v. Dunlap*, 3 *Bibb*. 216;) and hence, although the failure to comply with its provisions may be sufficient cause to set the sale aside, upon the application of the parties to the writ, yet it does not render the sale void. *San Francisco v. Pixley*, 21 *Cal.* 59; *Blood v. Light*, *Cal. Sup. Ct., Oct. T.*, 1869.

PROPERTY EXEMPT.

15. A Personal Right.—The exemption of property from sale on execution is a personal right, which the debtor may waive or claim as his election. *Borland v. O'Neal*, 22 *Cal.* 504.

16. Cartman, Huckster, Peddler.—Two oxen, two horses or two mules, and their harness, and one cart or wagon, by the use of which a cartman, huckster, peddler, teamster, or other laborer habitually earns his living, with food for such oxen, horses or mules for one month. (*Cal. Pr. Act*, § 219, Subd. 6.) In the Act which exempts certain articles from execution, the term "wagon" is intended to mean a common vehicle, for the transportation of goods, wares and merchandise. (*Quigley v. Gorham*, 5 *Cal.* 418.) A hackney coach used for the conveyance of passengers is a different article, and does not come within the equity or literal meaning of the Act. *Quigley v. Gorham*, 5 *Cal.* 418; see *Roberts v. Adams*, *Cal. Sup. Ct., Jul. T.*, 1869.

17. Earnings.—The earnings of the judgment-debtor, for his personal services at any time within thirty days next preceding the order of a judge or referee, shall not be applied to the satisfaction of the judgment. *Cal. Pr. Act*, § 219, Subd. 10 and § 243.

18. Farming Utensils.—The farming utensils or implements of husbandry of the judgment-debtor, also two oxen or two horses or two mules, and their harness, four cows, one cart or wagon, and food for such oxen, horses, cows or mules for one month; also all seed, grain or vegetables actually provided, reserved or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars. (*Cal. Pr. Act*, § 219, Subd. 3.) The intention of the Act was to make this exemption applicable to such judgment-debtors as were engaged in farming at the time of the levy. (*Brusie v. Griffith*, 34 *Cal.* 305; cited in *Robert v. Adams*, *Cal. Sup. Ct., Jul. T.*, 1869.) And it was intended to apply only to oxen, horses and mules suitable and intended for the ordinary work conducted on a farm. *Robert v. Adams*, *Cal. Sup. Ct., Jul. T.*, 1869.

19. Fire Companies.—All fire engines, hooks and ladders, with the carts, trucks and carriages, hose, buckets, implements and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this State. *Cal. Pr. Act*, § 219, Subd. 7.

20. Homestead.—The homestead shall be exempt from execution. (*Gen. Laws of Cal.* ¶¶ 35, 41, 46.) And this exemption is extended to the right to homesteads held in joint tenancy, tenancy in common, or where the claimant owns only an undivided interest therein;

it also applies to all homesteads heretofore recorded. *Laws of Cal.* 1867-8, p. 116.

21. Household Furniture.—Necessary household, table and kitchen furniture, including stoves, stovepipes and stove furniture, wearing apparel, beds, bedding and bedsteads, and provisions actually provided for family use for one month. (*Cal. Pr. Act*, § 219, Subd. 2.) The fact that the number of beds claimed—six in all—is greater than is required for the immediate and constant use of the family is no objection. Such a construction of the Statute would be too narrow. (*Haswell v. Parsons*, 15 *Cal.* 266.) As to when exemption may be claimed, *Id.*

22. Life Insurance Policy.—No money, benefit, right, privilege, or immunity accruing, or in any manner whatever growing out of any life insurance on the life of the debtor, made in any insurance company incorporated under the laws of this State, shall be subject to levy under attachment or execution, or under any original mesne or final process whatever against such debtor, or to be taken, sequestered, or reached by any proceeding supplementary to execution or other like proceeding; *provided*, however, this exemption shall not extend beyond such moneys, benefits, rights, privileges and immunities as have been or might have been secured by the payment of an annual premium not exceeding five hundred dollars. (*Laws of Cal.* 1867-8, p. 500.) The party claiming that a life insurance policy, under the Statute of this State, is exempt from execution, must show that the policy was issued by a company incorporated under the laws of this State, and that the benefits which he expects to derive from the policy are such as might have been secured by the payment of annual premium not exceeding five hundred dollars. (*Briggs v. McCullough*, 36 *Cal.* 542.) And an endowment policy is an insurance on life, within the sense of the Statute.

23. Lots in Cemeteries are exempt from sale. *Laws of Cal.* 1861, p. 565.

24. Mechanics' Tools, etc.—Tools or implements of a mechanic or artisan, necessary to carry on his trade, shall be exempt from execution. (*Cal. Pr. Act*, § 219, Subd. 4.) The fourth subdivision of Section 319 of the California Practice Act exempts the tools or implements of a mechanic or artisan, "*necessary to carry on his trade*," the instruments and chest of a surgeon, physician, surveyor or dentist, "*necessary to the exercise of their profession*, with their scientific and pro-

fessional libraries," the law library of an attorney, and the libraries of ministers of the Gospel. *Roberts v. Adams, Cal. Sup. Ct., Jul. T. 1869.*

24. Military.—All arms, uniforms and accoutrements required by law to be kept by any person. *Cal. Pr. Act, § 219, Subd. 8.*

25. Mining Property.—The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars, also his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements and appliances necessary for carrying on anykind of mining operations, not exceeding in value the aggregate sum of five hundred dollars, and two horses, mules, oxen, with their harness, and food for such horses, mules, or oxen for one month. (*Cal. Pr. Act, § 219, Subd. 5.*) The fifth subdivision exempts the cabin of a miner, and his sluices, pipes, windlass, and other "appliances necessary for carrying on any mining operations," including two horses, mules or oxen, and food for the same for one month, "when necessary to be used for any whim, windlass, derrick, car, pump, or hoisting gear." *Robert v. Adams, Cal. Sup. Ct., Jul. T., 1869.*

26. Office Furniture.—Chairs, tables, desks and books, to the value of one hundred dollars, shall be exempt from execution. (*Cal. Pr. Act, § 219, Subd. 1.*) Pews in churches are exempt. *Laws of Cal. 1861, p. 566.*

27. Professional Persons.—The instruments and chest of a surgeon, physician, surveyor, and dentist, necessary for the exercise of their profession, with their scientific and professional libraries, the law libraries of attorneys and counselors, and the libraries of ministers of the Gospel. (*Cal. Pr. Act, § 219, Subd. 4.*) And one horse, with vehicle and harness or other equipments, used by a physician or surgeon or minister of the Gospel in making his professional visits, with food for such horse for one month. *Cal. Pr. Act, § 219, Subd. 6.*

28. Public Property.—All court houses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the court house, jail and public offices belonging to any county of this State, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and

appertaining, owned or held by any town or incorporated city, or dedicated by such to health, ornament or public use, or for the use of any fire or military company organized under the laws of the State, but no article or species of property mentioned in this Section shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon. *Cal. Pr. Act*, § 219, Subd. 9.

29. Searchers of Records.—The books, papers, maps and diagrams of a person engaged in searching records and making abstracts of titles, used in such business, shall be exempt from execution in all cases, except upon a judgment recovered for the purchase-money thereof or upon a mortgage thereon. *Laws of Cal.* 1867–8, p. 126.

30. Sewing Machines.—In addition to the property now exempted by law from sale or levy on execution, there shall be exempted one sewing machine of a value not exceeding one hundred dollars, in actual use by each debtor or the family of the debtor. *Laws of Cal.* 1864, p. 92.

PROPERTY IN THIRD PERSON.

31. Adverse Titles.—Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit. Such titles must be settled in a different action, giving rise as they generally do, to questions of purely legal cognizance. (*San Francisco v. Lawton*, 18 *Cal.* 465.) If any of the parties defendant in an action to foreclose a mortgage claim title to the mortgaged premises, or any portion thereof, adversely to the title mortgaged, their rights under such adverse title should be saved in the decree. (*Elias v. Verdugo*, 27 *Cal.* 420; *San Francisco v. Lawton*, 21 *Cal.* 589.) When a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up, as a full defense, a tax title, he cannot object afterwards that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 *Cal.* 609.

32. Estate in Land.—The purchaser of real estate at execution sale, both before and after the period for redemption expires, has an estate in the land purchased, which may be levied on and sold on an execution running against his property. *Page v. Rogers*, 31 *Cal.* 263.

33. Joint Property.—Where the execution-debtor owns property jointly with another, a sheriff, who has such execution, has the right to levy on such property and take it into possession for the purpose of subjecting it to sale. (*Waldman v. Broder*, 10 *Cal.* 378.) As to property not segregated, see (*Adams v. Gorham*, 6 *Cal.* 60; see, also, *Waldman v. Broder*, 10 *Cal.* 378; *Bernal v. Hovious*, 17 *Cal.* 542; 12 *Cal.* 196; *Loring v. Illsley*, 1 *Cal.* 131; *Low v. Adams*, 6 *Cal.* 277.

34. Liability of Sheriff.—Where a sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond. *Van Pelt v. Littler*, 14 *Cal.* 194; 30 *Cal.* 190; *Markley v. Rand*, 12 *Cal.* 275; 12 *Cal.* 277.

35. Money in Bank.—Where negotiable certificates of deposit have been issued to the depositor, there is nothing left in the possession of the bankers belonging to the depositor upon which an attachment issued against his property can fasten. *McMillan v. Richards*, 9 *Cal.* 365.

36. Notice to Sheriff.—*Ledley v. Hays*, 10 *Cal.* 166; *Taylor v. Seymour*, 6 *Cal.* 512; *Daumiel v. Gorham*, *Id.* 43; *Killey v. Scannell*, 12 *Cal.* 73; *Blevin v. Freer*, 10 *Cal.* 172; *Boulware v. Craddock*, 30 *Cal.* 190.

37. Pledgee.—While the interest of the pledgor may be reached under an execution, it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge. *Treadwell v. Davis*, 34 *Cal.* 601.

38. Property Defined.—The word "property" includes a judgment. (*Adams v. Hackett*, 7 *Cal.* 203; 13 *Cal.* 15; *Davis v. Mitchell*, 34 *Cal.* 81.) The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or mere right of possession. (*State of California v. Moore*, 12 *Cal.* 56.) Land embraces all titles, legal or equitable, perfect or imperfect. (*Leese v. Clark*, 20 *Cal.* 388; 12 *Cal.* 56.) Cases where title to property was held to be in third person by assignment and otherwise. See *Swanston v. Sublette*, 1 *Cal.* 123; *Bryan v. Sharp*, 4 *Cal.* 351; *Eldridge v. See Yup Co.*, 17 *Cal.* 44; *Petrie v. Bugbee*, 24 *Cal.* 423.

39. Property in Custody of the Law.—Property in the custody of the law is not liable to seizure without an order from the Court having charge thereof. (*County of Yuba v. Adams*, 7 *Cal.* 35.) A sheriff cannot levy upon money in his own hands belonging to the judgment-debtor, when he has received the money on an execution in favor of this debtor. (*Clymer v. Willis*, 3 *Cal.* 363.) But, it seems, funds in the hands of a receiver, in a suit for dissolution, are subject to attachment at any time before a final decree of dissolution and distribution. *Adams v. Woods & Haskell*, T.A. Lynch, Intervenor, 9 *Cal.* 24.

40. Public Property.—The levy upon and sale of a road, by virtue of an execution, gives the purchaser no right or title to the same for being the property of the public. The defendant in the execution has no interest therein which can be conveyed by the officer. (*Wood v. Truckee Turnpike Co.*, 24 *Cal.* 474.) But a ferry-boat, used for the transportation of passengers, teams, etc., across a stream, is not exempt from execution because the ferry is on the mail route, and the boat is used also to convey the United States mail across the stream. *Lathrop v. Middleton*, 23 *Cal.* 257.

41. Verdict, Effect of.—A sheriff is not protected in the sale of personal property by the verdict of a jury on the trial of the right of property, under the provisions of Section two hundred and eighteen of the Code. The proceedings before a sheriff, in such a trial, are not judicial. *Perkins v. Thornburgh*, 10 *Cal.* 189; *Sheldon v. Loomis*, 28 *Id.* 122.

PROPERTY WHICH MAY AND MAY NOT BE LEVIED ON.

42. Choses in Action.—Things in action are such property as may be levied upon, on execution. *Adams v. Hackett*, 7 *Cal.* 187.

43. Coin.—Coin held in the hand, like a horse held by the bridle, may be levied upon. *Green v. Palmer*, 15 *Cal.* 411.

44. Commercial Paper.—Under Section 246 of the California Practice Act, if commercial paper be mortgaged, the mortgage may be foreclosed, and the securities sold under the decree, and, by Sections 217 and 220, such securities may be seized and sold under execution on a judgment at law. *Davis v. Mitchell*, 34 *Cal.* 87; cited in *Donahoe v. Gamble*, *Cal. Sup. Ct., Jul. T.*, 1869.

45. Counties, Suits Against.—An execution levy upon a county's revenues in the hands of the treasurer is illegal and void. (*Gilman v. Contra Costa County*, 8 *Cal.* 52.) The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. *Emerrick v. Gilman*, 10 *Cal.* 404.

46. Contingent Interests.—Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and *chose in action*, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy, and announced at the sale. *Crandall v. Blen*, 13 *Cal.* 15.

47. Firm Property.—The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff, on an execution against one of the partners. (*Jones v. Thompson*, 12 *Cal.* 191.) The fact that individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property, as against firm creditors, who have not yet obtained judgment. (*Conroy v. Woods*, 13 *Cal.* 631; *Eldredge v. See Yup Co.*, 17 *Cal.* 44.) But the sheriff can only seize and sell the interest and right of the judgment-partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. *Jones v. Thompson*, 12 *Cal.* 191.

48. Franchises.—A ferry license, being a franchise, is not the subject of levy and sale under execution. *Thomas v. Armstrong*, 7 *Cal.* 286; 24 *Cal.* 474.

49. Mining Interest.—The interest of a miner in his mining claim is property, and may be taken and sold under execution. (*McKeon v. Bisbee*, 9 *Cal.* 137.) The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure. *Halsey v. Martin*, 22 *Cal.* 645.

50. Promissory Note.—A promissory note is liable to seizure and sale under execution against the holder and payee. By such a sale, the purchaser takes the note upon the same terms upon which he would have taken it had it come into his hands in the ordinary course of business. *Davis v. Mitchell*, 34 *Cal.* 81.

*No. 1051.**Undertaking of Indemnity to Sheriff.*

KNOW ALL MEN BY THESE PRESENTS:

That we, J. R. as principal, and L. M. and N. O. as sureties, are held and firmly bound unto R. S., Sheriff of the County of, in the sum of dollars gold coin of the United States of America, to be paid to the said Sheriff, or his certain attorney, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of, 18...

Whereas, under and by virtue of a writ of execution, issued out of the Court of the County of, in an action wherein the said A. B. was plaintiff, and C. D. was defendant, against said defendant, directed and delivered to said R. S., Sheriff of the County of, the said Sheriff was commanded to satisfy the judgment, with interest, out of the personal property of such defendant within his County not exempt from execution, and if sufficient personal property could not be found, then out of the real property belonging to on the day when the said judgment was docketed, or at any time subsequently, the said Sheriff did thereupon levy upon and take into his possession the following described goods and chattels:

[*Description.*]

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, P. Q. claimed the said goods and chattels as his property, and thereupon a jury was summoned by the said Sheriff to try such claim, which said jury have by their finding decided in favor of said claimant. And whereas, the said plaintiff, notwithstanding such finding, requires of said Sheriff that he shall retain said property under such levy and in his custody.

Now, therefore, the condition of this obligation is such, that if the said L. M. and N. O., their heirs, executors and administrators, shall well and truly indemnify and save harmless the said Sheriff, his heirs, executors, administrators and assigns, of and from all damages, expenses, costs and charges, and against all loss and liability which he, the said Sheriff, his heirs, executors, administrators or assigns, shall sustain or in any wise be put to, for or by reason of the levy, taking, sale or retention by the said Sheriff, in his custody, under said execution, of the said property claimed as aforesaid, then the above obligation to be void; otherwise to remain in full force and virtue.

[SIGNATURES AND SEALS.]

51. Proceedings.—If several creditors levy, and those prior fail to indemnify the Sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility. (*Davidson v. Dallas*, 8 Cal. 227.) An agreement to indemnify a Sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right. (*Stark v. Raney*, 18 Cal. 622.) In a suit against the Sheriff for not levying the execution, if the Sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he rendered the bond of indemnity to the Sheriff required by law. *Strong v. Patterson*, 6 Cal. 156.

SALE UNDER EXECUTION.

52. How Conducted.—All sales of property under execution shall be made at auction to the highest bidder, and shall be made between the hours of nine in the morning and five in the afternoon; after sufficient property has been sold to satisfy the execution, no more shall be sold. (*Cal. Pr. Act*, § 223.) By the Statute of 1860, personal property should be sold in the *presence of the purchaser*, and real property or leasehold estates of more than one year in front of the Court House door. (*Smith v. Morse*, 2 *Cal.* 524; consult, also, *Raun v. Reynolds*, 11 *Cal.* 14; *Smith v. Randall*, 6 *Cal.* 47; *Tuolumne Redemption Co. v. Sedgwick*, 15 *Cal.* 515.) As to sale in mass of real estate being void, *San Francisco v. Pixley*, 21 *Cal.* 56.

53. Liability of Sheriff.—If the officer, by his misconduct, induced a sale of the property for less than it would otherwise have brought, the remedy must be an action for damages resulting from his acts, and not an action to recover the property or its value. *Foster v. Coronel*, *Oct. T.*, 1867, not reported.

54. Notice of Sale.—Before the sale of property in execution, notice thereof must be given by the Sheriff. As to form and sufficiency of notice, see (*Cal. Pr. Act*, § 221.) And although the officer neglects to give the notice, the sale shall not be void. (*Smith v. Randall*, 6 *Cal.* 47; *Harvey v. Frisk*, 8 *Id.* 93.) But the officer shall in that event forfeit five hundred dollars to the aggrieved party, in addition to his actual damages. *Cal. Pr. Act*, § 222; see *Asken v. Ebberts*, 22 *Cal.* 263.

55. Order of Sale must Issue.—A sheriff has no authority to make sale of mortgaged premises under a judgment of foreclosure and sale, unless an order of sale is issued upon the judgment and placed in his hands. (*Heyman v. Babcock*, 30 *Cal.* 367.) If the first order of sale on a foreclosure decree be not executed, a second order may issue. (*Shores v. Scott River Water Co.*, 17 *Cal.* 626.) Or an execution may issue on personal property of defendant, where a personal judgment is also taken. (*Englund v. Lewis*, 25 *Cal.* 357.) That a personal judgment may be entered in connection with the decree, see *Cormerais v. Genella*, 22 *Cal.* 116.

56. Personal Property, how Delivered.—When property is capable of manual delivery, the officer shall deliver to the the pur-

chaser the property, and, if desired, shall execute and deliver to him a certificate of the sale and payment. (*Cal. Pr. Act*, § 227.) When the property is not capable of manual delivery, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall convey to the purchaser all right, title and interest which the debtor had in and to such property on the day the execution was levied. (*Cal. Pr. Act*, § 228.) Assignment of judgment under sheriff's sale. (*Fore v. Manlove*, 18 *Cal.* 436.) Certificate, what is sufficient. (*Lay v. Neville*, 25 *Cal.* 551.) Officer defined, see (*People v. Bornie*, 8 *Cal.* 406.) A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate. *Lay v. Neville*, 25 *Cal.* 551.

57. Real Property, Certificate of Sale.—The officer shall give to the purchaser a certificate of the sale, containing: *First*, A particular description of the real property sold; *Second*, The price bid for each distinct lot or parcel; *Third*, The whole price paid; *Fourth*, When subject to redemption, it shall be so stated, and when the judgment is made payable in a specific kind of money or currency, the certificate shall state the kind of money or currency in which such redemption may be made, which shall be the same as that specified in the judgment, a duplicate of which certificate shall be filed with the Recorder of the County. (*Cal. Pr. Act*, § 229.) As to the title under such sale, see *Eldredge v. See Yup Co.*, 17 *Cal.* 44; *McMillan v. Richards*, 9 *Cal.* 365; *Cummings v. Coe*, 10 *Cal.* 529; *Cloud v. El Dorado Co.*, 12 *Cal.* 128; *Clark v. Lockwood*, 21 *Cal.* 220; *People v. Doe*, 31 *Id.* 220; *Page v. Rogers*, 31 *Id.* 293; *People v. Mayhew*, 26 *Id.* 655; *Baber v. McLellan*, 30 *Id.* 135; *Steinbach v. Leese*, 27 *Id.* 297; see, also, *Bickerstaff v. Doub*, 19 *Id.* 109.

58. Re-Sale of Property.—If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property, at any time, to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, by motion, upon previous notice of five days, before any Court, or before any Justice of the Peace, if the same shall not exceed his jurisdiction. (*Cal. Pr. Act*, § 224.) As to rights of purchaser, see, (*People v. Hays*, 5 *Cal.* 66; *Williams v. Smith*, 6 *Cal.* 91; *Harvey v. Fisk*, 9 *Cal.* 93.) For equitable relief, see (*Goodenow v. Ewer*, 16 *Cal.* 461; *Webster v. Haworth*, 8 *Cal.* 21.) As to the doctrine of *caveat emptor*, see *Boggs v. Hargrave*, 16 *Cal.* 559;

Williams v. Smith, 6 *Cal.* 91; *Webster v. Haworth*; 8 *Cal.* 21; *Harvey v. Fisk*, 9 *Cal.* 93; see, also, *Johns v. Trick*, 22 *Cal.* 511.

59. Reversal on Appeal, Effect of.—A judgment unreversed and not suspended may be enforced, but when reversed it is as if never rendered; and money collected by authority of it may, as a general rule, be recovered back; (*Raun v. Reynolds*, 18 *Cal.* 275;) and property or advantages must be restored. *Reynolds v. Harris*, 14 *Cal.* 680.

60. Sale in Parcels.—The well established rules of equity proceedings require, in foreclosure cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second. *Raun v. Reynolds*, 11 *Cal.* 14.

61. Setting Aside Sale.—As to the rights of purchaser, on motion to set aside sale for irregularity, see (*Cal. Pr. Act*, § 237.) The purchaser at sheriff's sale is entitled to notice to set it aside, but personal service is not required even if absent from the State. (*Eckstem v. Calderwood*, 27 *Cal.* 413; 34 *Cal.* 658.) As to the revival of judgments and proceedings therefor, see *Humiston v. Smith*, 21 *Cal.* 129; consult, also, *Boggs v. Hargrave*, 16 *Cal.* 566; and *Burton v. Lies*, 21 *Cal.* 88.

62. Sheriff's Deed.—If no redemption be made within six months after the sale, the purchaser or his assignee shall be entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption shall have expired, and the last redemptioner, or his assignee, shall be entitled to a Sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated, and he be restored to his estate. (*Cal. Pr. Act*, § 232.) A deed executed by the Sheriff immediately after the sale, without waiting the statutory time, is void. (*Gross v. Fowler*, 21 *Cal.* 392; *S. and L. Society v. Thompson*, 32 *Id.* 347; *Bernal v. Glein*, 33 *Cal.* 668.) As to effect of sheriffs' deeds and certificates of sale, see the following cases: *Anthony v. Wessel*, 9 *Cal.* 103; *Knight v. Fair*, *Id.* 117; *Tuol. Redemp. Co. v. Sedgwick*, 15 *Cal.* 515; *McCarty v. Christie*, 13 *Cal.* 81; *Lewis v. Thompson*, 3 *Cal.* 266; *Williams v. Smith*, 6 *Cal.* 91; *Cloud v. El Dorado Co.*, 12 *Cal.* 128; *Gross v.*

Fowler, 21 *Cal.* 392; Mills *v.* Sukey, 22 *Cal.* 373; Donahue *v.* McNulty, 24 *Cal.* 411; People *v.* Doe, 31 *Cal.* 220.

63. Summary Proceedings against Purchaser.—The Court may proceed to issue execution against the purchaser who refuses to pay, or against a subsequent purchaser. (*Cal. Pr. Act*, § 225.) As to liability of sheriff for money not paid over by sheriff, see Egerly *v.* Buchanan, 5 *Cal.* 53.

64. Title Acquired by Sale.—By the common law, all judgments had relation to the first day of the term at which they were rendered, and an execution could be issued and attested as of that day. To avoid the mischiefs which resulted from such a rule, it was enacted in the Statute against Frauds and Perjuries—(*Eng. Stat. at L.* 12, Cha. to 7 and 8, Will iii, p. 430.) The Statute of this State, in providing that under a levy property shall not be affected by the execution, has gone further than the English Statute, and has entirely obviated the evils of the common law rule. (*Blood v. Light, Cal. Sup. Ct., Oct. T., 1869.*) So, in the case of personal property, the title transferred by the sale cannot antedate the day of the sale, as against *bona fide* purchasers, where the seizure was made only on the day of sale. (*Allentown Bank v. Beck, 49 Penn.* 409.) So, in case of land, the title dates from the docketing of judgment as against third persons, and not from the date of any real or pretended statutory levy. (*Blood v. Light, Cal. Sup. Ct., Oct. T., 1869.*) A mortgagor, after the sale, has the right to the use and possession of the mortgaged premises until the execution of the Sheriff's deed; but no right to despoil the property of its fixtures. The deed of the Sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. (*Sands v. Pfeiffer, 10 Cal.* 258.) Such as the engine and boilers, etc., used in a flour mill. *Id.*

65. Title, Character of.—The purchaser of a judgment on sale under execution and levy takes as assignee only, assuming that a judgment is the subject of levy and sale. The Sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner. *Fore v. Manlove, 18 Cal.* 436.

66. Title, on what it Depends.—The purchaser's title in no respect depends upon the return, but upon the judgment, sale and deed. (*Cloud v. El Dorado, 12 Cal.* 128; *Clarke v. Lockwood, 21*

Cal. 220; *Moore v. Martin*, *Cal. Sup. Ct., Jul. T.*, 1869; *Blood v. Light*, *Cal. Sup. Ct., Oct. T.*, 1869.) The deed is, however, void, if made before the expiration of six months after the sale. (*Gross v. Fowler*, 21 *Cal.* 392; *Bernal v. Gleim*, 33 *Id.* 668; *Moore v. Martin*, *Cal. Sup. C., Jul. T.*, 1869.) The title of a purchaser, under a sale on a decree of foreclosure, cannot be impeached in a collateral action for irregularity in the proceedings on the sale. *Nagle v. Macy*, 9 *Cal.* 426; consult *Alderson v. Bell*, 9 *Id.* 321; *Nagle v. Macy*, 429; *Hayes v. Shattuck*, 21 *Id.* 51; *Boggs v. Hargrave*, 16 *Id.* 566; *Burton v. Lies*, 21 *Id.* 88.

REDEMPTION AFTER SALE.

67. Payments, how Made.—The payment mentioned in the last two sections may be made to the purchaser or redemptioner, as the case may be, or for him to the officer who made the sale, when the judgment has been made payable in a specified kind of money or currency; and a tender of the money shall be equivalent to payment. (*Cal. Pr. Act*, § 233.) Payment cannot be made in certified checks. (*People v. Hayes*, 4 *Cal.* 127.) Where a particular currency is not specified, legal tender notes are sufficient. (*People v. Mayhew*, 26 *Cal.* 655.) As to who may receive redemption money, see *People v. Borning*, 8 *Cal.* 406; *Anthony v. Wessel*, 9 *Id.* 103; *Baber v. McLellan*, 30 *Id.* 135; *People v. Mayhew*, 26 *Id.* 655.

68. Proceedings on Redemption.—The redemptioner must produce a copy of the docket of the judgment. (*Cal. Pr. Act*, § 234; *Haskell v. Manlove*, 14 *Cal.* 54.) A copy of any assignment necessary to establish his claim. (*Cal. Pr. Act*, § 234; *Reynolds v. Harris*, 14 *Cal.* 667.) And an affidavit by himself or his agent, showing the amount then actually due on the lien. (*Cal. Pr. Act*, § 234.) And during the time for redemption, the Court may restrain waste; (*Id.* § 235;) and the purchaser or last redemptioner shall be entitled to the rents and profits intermediate the sale and final redemption. (*Id.* § 236; *Guy v. Middleton*, 5 *Cal.* 392; *Reynolds v. Lathrop*, 7 *Id.* 43; *McDevitt v. Sullivan*, 8 *Id.* 592; *Harris v. Reynolds*, 13 *Id.* 514; *Kelsey v. Abbott*, 13 *Id.* 609; *Knight v. Truett*, 18 *Id.* 113; *Kline v. Chase*, 17 *Id.* 596; *Whitney v. Allen*, 21 *Id.* 233; *Shores v. Scott River Co.*, 21 *Id.* 135; *Henry v. Everts*, 30 *Id.* 425; *Mayo v. Woods*, 31 *Id.* 269; *Page v. Rogers*, 31 *Id.* 293.

69. Real Property Subject to Redemption.—Upon a sale of real property, the purchaser shall be substituted to and acquire all the right, title and interest therein, and claim of the judgment-debtor thereto; and when the estate is less than a leasehold of two years unexpired term, the sale shall be absolute. In all other cases the property shall be subject to redemption, as provided in this chapter. (*Cal. Pr. Act*, § 229.) The Legislature had power to provide that all judicial sales of real estate thereafter to be made, whether upon judgments then existing, or upon judgments thereafter to be obtained upon contracts then existing, should be made subject to redemption, without violating either the Federal or State Constitution. *Moore v. Martin*, *Cal. Sup. Ct., Jul. T.*, 1869.

70. Sale of Equity of Redemption.—The sale of the equity of redemption of mortgaged premises, and assignment of the rents thereof, until foreclosure and sale, to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured, and may be enforced by foreclosure. (*Dewey v. Latson*, 6 *Cal.* 609.) As to relative rights of parties thereunder, consult *Montgomery v. Tutt*, 11 *Cal.* 307; *McMillan v. Richards*, 9 *Cal.* 365; *McDermott v. Burke*, 16 *Cal.* 580; *Harlan v. Smith*, 6 *Cal.* 173; *Cowing v. Rogers*, 34 *Cal.* 648; *Goode-now v. Ewer*, 16 *Cal.* 461; *Daubenspeck v. Platt*, 22 *Id.* 330; *Alexander v. Greenwood*, 24 *Id.* 506; *Bludworth v. Lake*, 33 *Id.* 255, 265.

71. Subsequent Redemption.—If property be so redeemed by a redemptioner, either the judgment-debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent. thereon in addition, and the amount of any assessment or taxes which the the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; provided, that the judgment under which the property was sold need not be so paid as a lien, or it may be successively redeemed as often as the debtor or a redemptioner is so disposed, on the above terms. Notice of redemption shall be given to the Sheriff. *Cal. Pr. Act*, § 232.

72. Time and Terms of Redemption.—The judgment-debtor or redemptioner may redeem the property from the purchaser, within six months after the sale, on paying the purchaser the amount

of his purchase, with twelve per cent. thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount; and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest. (*Cal. Pr. Act*, § 231.) Months as used in the Statute defined, (*Gross v. Fowler*, 21 *Cal.* 392.) As to taxes, see (*Seale v. Doane*, 17 *Id.* 476.) As to interest, (*McMillan v. Vischer*, 14 *Id.* 232; *Kirkham v. Dupont*, 14 *Id.* 559.) Estate, in whom vested. (*McMillan v. Richards*, 9 *Id.* 365; *Anthony v. Wessel*, *Id.* 103.) Excessive payment not compulsory. *McMillan v. Vischer*, 14 *Id.* 235.

73. Who may Redeem.—Property sold subject to redemption, as provided in Section 229, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest: *First*, The judgment-debtor, or his successor in interest, in the whole or any part of the property. *Second*, A creditor, having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners. (*Cal. Pr. Act*, § 230.) Statute defined, (*Guy v. Middleton*, 5 *Cal.* 392; *Stout v. Macy*, 22 *Id.* 647; *Seale v. Mitchell*, 5 *Id.* 401; *Tuol. Redmp. Co. v. Sedgwick*, 15 *Id.* 515; *McMillan v. Richards*, 9 *Id.* 365.) As to rights of redemption, *Hickox v. Lowe*, 10 *Cal.* 207; *Raun v. Reynolds*, 11 *Id.* 20; *Montgomery v. Tutt*, 11 *Id.* 317; *Frink v. Murphy*, 21 *Id.* 108; *Grattan v. Wiggins*, 23 *Id.* 16; *People v. Mayhew*, 26 *Id.* 655; *Kent v. Cahoon*, 2 *Id.* 595; *Whitney v. Higgins*, 10 *Id.* 547; *McDermot v. Burke*, 16 *Id.* 590; *Kirkham v. Dupont*, 14 *Id.* 563; *Gamble v. Voll*, 15 *Id.* 510; *Daubenspeck v. Platt*, 22 *Id.* 330.

No. 1052.

Writ of Possession.

[TITLE.]

Whereas, on the day of, 18 . . , A. B., plaintiff, recovered a judgment in the said District Court of the Judicial District of the State of,

in and for the County, against C. D., defendant, for the possession of certain premises in said judgment and decree and hereinafter more particularly described, and also for the sum of dollars, damages for the detention of said premises, besides the sum of dollars, costs and disbursements, as appears to us of record.

And whereas, the judgment roll in the action in which said judgment was entered is filed in the Clerk's office of said Court, in the County of, and the said judgment was docketed in said Clerk's office, in the said County, on the day and year first above written.

Now, therefore, you, the said Sheriff, are hereby commanded and required to place the said A. B. in the quiet and peaceable possession of the lands and premises in said judgment and decree described, as follows, to wit:

[*Description.*]

And the sums of dollars, damages, and dollars, costs, are now (at the date of this writ) actually due on said judgment.

You, the said Sheriff, are hereby further required to make the said sums due on the said judgment, for damages and costs, and all accruing costs, to satisfy the said judgment, out of the personal property of said debtor, C. D.; or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to him on the day whereon said judgment was docketed in the said County, or at any time thereafter; and make return of this writ

within days after your receipt hereof, with what you have done indorsed hereon.

Witness, Hon., Judge of the Judicial District of the State of, at the Court House in the County of, this day of, 18...

74. Note.—Where L. and P. entered into possession of certain lands, under neither of the parties to an action for the possession of the same, and were not parties to said action, they cannot be dispossessed under a writ issued on a judgment rendered for plaintiff therein. *Rogers v. Parish*, 35 Cal. 127.

No. 1053.

Order for Writ of Assistance.

[TITLE.]

On reading and filing the affidavit of P. Q., setting forth that he was the purchaser of the premises described in the complaint herein, that he has presented to the defendant C. D. the Sheriff's deed for said property, and demanded possession thereof, and that said C. D. has refused to deliver to him possession of said premises, and it appearing that due notice has been given of this notice to Messrs., the attorneys of said defendant; now, on motion of, on behalf of said P. Q., it is ordered that a writ of assistance issue to the Sheriff of County, to put the said P. Q. in possession of the said premises, and him in the possession thereof from time to time to maintain and defend.

No. 1054.

Writ of Assistance.

[TITLE.]

The People of the State of California,
To the Sheriff of the County of,
greeting:

Whereas, by a certain decree or judgment of our District Court of the Judicial District of the State of, in and for the County of, in a certain action there pending between A. B., plaintiff, and C. D., defendant, made at a District Court of the Judicial District, held at, in the County of, on the day of, 18.., in and for the County of, before the Hon., Judge of the said Judicial District, it was, among other things therein contained, adjudged and decreed by the said Court, that the purchaser at the sale therein described should, on the production of the Sheriff's deed for said premises, be forthwith put in possession of a certain piece or parcel of land situate in the said County of, State of, and therein described, as follows, to wit: [*describe premises.*]

And whereas, time for redemption having expired, and the said Sheriff's deed duly executed and delivered to C. L., who was the purchaser at said sale, yet the said C. L. has not been let into nor taken possession of the said piece of land, or of any part thereof, according to the tenor of the said decree: And, whereas, the said piece of land is in the tenure and occupation of R. D.: And, whereas, by an order of said District Court of the

..... Judicial District, made in the said action on the day of, 18..., it was ordered that our writ of assistance should issue to you, the said Sheriff, to put the said C. L. in possession of the said piece or parcel of land, and him in possession thereof from time to time to maintain and defend:

Therefore, we command you, that immediately after receiving this writ, you go to and enter upon the said piece or parcel of land, and that you eject and remove therefrom all and every person or persons holding or detaining the same, or any part thereof, against the said C. L., and that you put and place the said C. L., or his assigns, in the full, peaceable, and quiet possession of the said piece or parcel of land, without delay, and him, said C. L., in such possession thereof, from time to time, maintain, keep, and defend, or cause to be kept, maintained, and defended, according to the tenor and true intent of the said decree and order of the said Court.

Witness, Hon., Judge of the Judicial District, at, in the County of, and the seal of said District Court, this day of, 18...

R. S.,
Clerk.

By N. O.,
Deputy Clerk.

'75. Against whom Issued.—A writ of assistance can only issue against the defendants in the suit, and parties holding under them who are bound by the decree. (*Burton v. Lies*, 21 Cal. 87.) Consult, on this subject, (*Harlan v. Rockerby*, 24 Cal. 561; *Sampson v. Ohleyer*, 22 Cal. 200; *Skinner v. Beatty*, 16 Cal. 156.) *Prima facie*, all who come into possession of the land pending the action to recover

possession must go out under the writ of possession, if the plaintiff recovers, for the presumption is that they came in under the defendant. (*Wetherbee v. Dunn*, 36 *Cal.* 147; *Leese v. Clark*, 29 *Cal.* 664.) If the defendant, pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment, if it was collusively obtained. (*Wetherbee v. Dunn*, 36 *Cal.* 147.) If the Court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused. *Steinbach v. Leese*, 27 *Cal.* 297.

76. Object of Writ.—A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the Sheriff's deed. *Montgomery v. Tutt*, 11 *Cal.* 190; *Wolf v. Fleishacker*, 5 *Id.* 244; *Reynolds v. Harris*, 14 *Id.* 677.

77. Power of Judge to Grant.—Prior to the passage of the Act of May 18th, 1861, judges of courts had no power to issue writs of assistance to place the purchaser of property sold under a decree of foreclosure in possession of the same. *Chapman v. Thornburg*, 23 *Cal.* 48; see, also, *People v. Doe*, 31 *Cal.* 220; *Steinbach v. Leese*, 27 *Cal.* 297.

78. Proceedings Requisite.—All that is requisite to obtain a writ of assistance, as against the parties and those claiming, with notice, under them, after the commencement of the action, is to furnish to the Court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it. (*Montgomery v. Middlemiss*, 21 *Cal.* 103.) Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree; and if, upon its service, that is disregarded, the Court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ, as against the defendant in the suit. *Montgomery v. Tutt*, 11 *Cal.* 190; *Wolf v. Fleischacker*, 5 *Id.* 244; *Reynolds v. Harris*, 14 *Id.* 677.

79. Setting Aside Writ.—If a writ of assistance be improperly issued or executed, the Court granting it can, on summary motion, set aside the writ or the service, and restore the possession. *Skinner v. Beatty*, 16 Cal. 156.

80. Who Entitled.—*Prima facie*, plaintiff in a foreclosure suit is entitled, after sale of the premises and Sheriff's deed to him, to a writ of assistance, as against the mortgagor and those entering under him subsequent to the decree, if they refuse to surrender possession. (*Skinner v. Beatty*, 16 Cal. 156.) So, the purchaser under a decree of foreclosure is entitled to a writ of assistance. *Montgomery v. Middlemiss*, 21 Cal. 103.

PART THIRTEENTH.

SPECIAL PROCEEDINGS.

CHAPTER I.

AGAINST JOINT DEBTORS.

Parties who were not originally served with the summons, and did not appear in the action, may be summoned after judgment, to show cause why they should not be bound in the same manner as though originally served. (*Cal. Pr. Act*, § 368.) The summons in such cases is to contain as provided in *Cal. Pr. Act*, § 369; and it must be accompanied by an affidavit that the judgment, or some part thereof, remains unsatisfied, specifying the amount due. (*Cal. Pr. Act*, § 370.) A part payment of a demand of one of two debtors will not discharge such debtor, making the payment from the payment of the balance. His obligation is to pay the whole. *Griffith v. Grogan*, 12 *Cal.* 317.

2. In Illinois, the remedy is by *scire facias*, under the common law. For proceedings in such cases, consult (*Puterbaugh's Common Law Pleading and Practice*, 685; 1 *Scam.* 231; 20 *Ill.* 509; *Scate's Treat. and Stat.* 242; *Purple's Stat.* 821.) That writs of attachment may be issued, (*Laws of Ill.* 1861, 167.) That a

scire facias is not an original action, consult (3 *Scam.* 499, 547.) And a *scire facias* may be issued after it is found that the judgment cannot be collected of the one against whom it was rendered. (26 *Ill.* 66.) As to the mode of proceedings against joint debtors in the State of New York, see (*N.Y. Code of Procedure*, as amended by 2 *Laws of* 1866, 1844, Ch. 824, § 15.) Where judgment has been entered under Section 136, see (*Foster v. Wood*, 1 *Abb. Pr. (N.S.)* 150.) Against debtor not served, see (*N.Y. Code*, § 375.) Which corresponds with the remedy in this State. (See *Dean v. Eldridge*, 29 *How. Pr.* 218.) That a judgment against joint debtors may be enforced by supplementary proceedings, see 5 *Paige*, 505; 7 *Id.* 448; *Emery v. Emery*, 9 *How. Pr.* 130; *Jones v. Lawlin*, 1 *Sandf.* 722.

3. Where, in an action against two defendants as joint debtors, the summons is served on one only, and no appearance is entered for the other, the judgment should be entered against both defendants, but directing the amount to be made of the joint property of both, and the individual property of the person served. (*Northern Bank of Kentucky v. Wright*, 5 *Robt.* 604.) That where the same judgment has passed in one action against two or more parties, they are, in respect to such judgment, joint debtors, *Barnes v. Smith*, 16 *Abb. Pr.* 420.

4. The remedy is not cumulative, but is substituted for the former practice, allowing a new action. (*Lane v. Salter*, 4 *Robt.* 239.) It does not alter any fundamental principle of law as to the joint liability of contractors, but is merely intended to alter the common

law in a point of practice. (*Niles v. Battershall*, 2 *Robt.* 146.) The summons cannot be issued on a judgment of the Marine or District Court (in New York), although it has been docketed in the County Clerk's office. *Ticknor v. Kennedy*, 4 *Abb. Pr. (N.S.)* 416.

AFFIDAVIT.

No. 1055.

A.B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above entitled action.

II. That on or about the day of, 18.., I recovered a judgment in said action, in the District Court of the Judicial District of the State of California, in and for the County of, against the defendant in said action, for dollars, for damages and costs, which judgment was duly entered and docketed, in the office of the Clerk of said Court, in the said County of; that an execution against the property of the said defendants was duly issued thereupon, and delivered to the Sheriff of said County of, being the county where said defendants then resided, and in which the judgment roll in said action is filed, to be executed according to law; that said execution has been duly returned by said Sheriff, and filed in the office of the Clerk of said Court, [wholly] unsatisfied and unpaid; that the said judgment still remains in full force and effect, [wholly] unsatisfied, and not reversed, vacated, or set aside.

III. I am informed, and verily believe, C.D., the defendant, has property, which he unjustly refuses to apply towards the satisfaction of the said judgment.

5. Answer.—The party summoned may answer the complaint as he might have done had he been originally served, or he may deny the judgment, or may set up any defense that may have arisen subsequently to the judgment. The action is really an action on the original joint contract, and matters of defense with respect to the judgment are merely incidental to the action. *Fay v. Hawley, Cal. Sup. Ct., Jan. T., 1870.*

6. Answer to Contain.—The party summoned may deny the judgment, or set up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the Statute of Limitations. *Cal. Pr. Act, § 371; Berlin v. Hall, 48 Barb. 422.*

7. Issues and Verdict.—The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability upon the obligation upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon. *Cal. Pr. Act, § 373.*

8. Pleadings.—If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, shall constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, shall constitute such written allegations. *Cal. Pr. Act, § 372.*

9. Release.—A release of one of several joint or joint and several debtors or obligors, is a release as to all, but it must be under seal. (*Armstrong v. Hayward, 6 Cal. 185; Rowley v. Stoddard, 7 Johns. 210; Cheatham v. Ward, 1 Bos. & Pul. 633; Nicholson v. Revill, 1 Ad. & El. 683; American Bank v. Doolittle, 14 Pick. 126; Tuckerman v. Newhall, 17 Mass. 583; Goodman v. Smith, 18 Pick. 415; cited in Prince v. Lynch, Cal. Sup. Ct., Jul. T. 1869.*) A discharge of joint debts discharges the separate liability of the debtors on a joint and several note given to secure a joint debt. (*Rixon v. Emary, Law Rep. C.P. 546.*) A covenant not to sue made to a portion of joint debtors does not release any of them. (*Matthey v. Gally, 4 Cal. 62.*) A receipt given to one joint debtor on a note for a part payment, coupled with the words "which is in full on his part on the within note, and the

said A.B. is hereby discharged from all obligationⁿ on the same," is not such a release as will discharge the others. (*Armstrong v. Hayward*, 6 *Cal.* 183.) One of two joint debtors, who has been released under the Insolvent Act, is liable to contribution to his co-debtor for money paid to satisfy the joint obligation after the discharge. 9 *Wend.* 312; 1 *Johns. Cas.* 73; *Ellsworth v. Caldwell*, 18 *Abb. Pr.* 20.

CHAPTER II.

PROCEEDINGS AGAINST JUDGMENT-DEBTOR.

1. Proceedings supplementary to execution, as provided in the California Practice Act, are proceedings which are a substitute for a creditor's action in the old practice. (*Adams v. Hackett*, 7 *Cal.* 187.) And are regulated by statute, and are equally applicable to justices' courts. As soon as such proceedings were instituted before the District Court, it obtained jurisdiction over the case, and had authority to apply the property of the judgment-debtor to the satisfaction of the judgment. (*Adams v. Hackett*, 7 *Cal.* 187.) As to how far these proceedings are deemed a new action, compare *Sale v. Lawson*, 4 *Sandf.* 718; *Davis v. Turner*, 4 *How. Pr.* 190; *Fellerman's Case*, 2 *Abb. Pr.* 155; 11 *How. Pr.* 528; *Griffin v. Dominique*, 2 *Duer*, 656; *Orr's Case*, 2 *Abb. Pr.* 457; *Dresser v. Van Pelt*, 15 *How. Pr.* 19.

2. It is not necessary to join in the proceedings the defendant not served in the action. (*Emery v. Emery*, 9 *How. Pr.* 130.) They cannot, however, be had against corporations. (*Hinds v. Canandaigua* and

Niagara Falls R.R. Co., 10 *How. Pr.* 487; Sherwood v. Buffalo and New York City R.R. Co., 12 *Id.* 136.) At least they are not applicable to insolvent corporations. (Hammond v. Hudson River Iron and Machine Co., 11 *How. Pr.* 29.) But they may be maintained on a judgment recovered before a justice of the peace, and docketed so as to become a judgment of the County Court. Conway v. Hutchings, 9 *Barb.* 378; Candee v. Gundelshamer, 8 *Abb. Pr.* 435; but see Whetlock's Case, 1 *Abb. Pr.* 320.

3. The Statute provides that when execution is returned unsatisfied, the judgment-creditor may compel the judgment-debtor to appear before a judge and answer concerning his property; but no judgment-debtor could be compelled to attend before a judge or referee out of the county in which he resides. (*Cal. Pr. Act*, § 238; *N. Y. Code*, § 292.) As to proceedings in such cases, consult (*Cal. Pr. Act*, § 239.) Before supplementary proceedings can be instituted on the return of an execution, the creditor's remedy by execution must be really exhausted. (Rodney v. Griffiths, 6 *Abb. Pr.* 211; Spencer v. Cuyler, 17 *How. Pr.* 157; Rutterbond v. Maryatt, 12 *N. Y. Leg. Obs.* 158; Nagle v. James, 7 *Abb. Pr.* 234; Phelps v. Brooks, 1 *Code R.* 83; Messenger v. Fisk, *Id.* 106; Simpkins v. Page, *Id.* 107.) A levy of a second execution, if not sure to satisfy the debt, is no objection to supplementary proceedings under the first execution. Salter v. Lawson, 4 *Sandf.* 718; Fellerman's Case, 2 *Abb. Pr.* 155; 11 *How. Pr.* 528; Hanson v. Templer, 1 *Code R. (N.S.)* 154; but compare McArthur v. Lansburgh, *Id.* 211.

*No. 1056.**Affidavit and Order for Examination of Debtor or of Bailee
of Debtor.*

[TITLE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above entitled action.

II. On or about the day of, 18..., I recovered a judgment in said action in the District Court of the Judicial District of the State of, in and for the County of, against the defendant in said action, for dollars, or thereabouts, for damages and costs, which judgment was duly entered and docketed in the office of the Clerk of said Court, in the said County of; that an execution against the property of the said defendant was duly issued thereupon, and delivered to the Sheriff of said County of, being the County where said defendant then resided, and in which the judgment roll in said action is filed, to be executed according to law; that said execution has been duly returned by said Sheriff, and filed in the office of the Clerk of said Court, [wholly] unsatisfied and unpaid; that the said judgment still remains in full force and effect, [wholly] unsatisfied, and not reversed, vacated, or set aside.

III. That, as I am informed and verily believe, A.B. has property [belonging to said judgment-debtor], exceeding in value dollars, which he unjustly refuses to apply towards the satisfaction of the said

judgment, [and is indebted to the said judgment-debtor in an account exceeding dollars].

[*Jurat.*]

[SIGNATURE.]

4. Affidavit.—The affidavit must show, as a jurisdictional fact, that the execution was against the property. (*People v. Hurlburt*, 5 *How. Pr.* 446; but see *McArther v. Lansburg*, 1 *Code R. (N.S.)* 211.) It need not state that the defendant has property. (*Hough v. Kohlin*, 1 *Code R. (N.S.)* 232; *Anonymous*, 3 *Sandf.* 725; *Hatch v. Weyburn*, 8 *How. Pr.* 163; overruling *Fellow v. Vere*, 1 *Code R.* 130; *Jones v. Lawlin*, 1 *Sandf.* 722.) If the affidavit shows that the creditor is assignee of the judgment, it sufficiently shows his right to proceed. (*Hough v. Kohlin*, 1 *Code R. (N.S.)* 232; *Orr's Case*, 2 *Abb. Pr.* 457; *Ross v. Cluffman*, 3 *Sandf.* 376.) Or it may be in the name of the nominal plaintiff, for it is not a new suit. (*Id.*) Or on application for an order to examine a third party, an affidavit following the alternative words of the Statute, "has property, etc., or is indebted," is not sufficient. *Lee v. Heirberger*, 1 *Code R.* 38.

No. 1057.

Order for Appearance of Debtor.

State of California, }
County of } ss.

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom, that C.D., the defendant in the above entitled action, has property, which he unjustly refuses to apply towards the satisfaction of the judgment in said action, and that it is a proper case for this order, and on application of the plaintiff's attorney, I, the undersigned, Judge of the said District Court of the Judicial District of the State of, do hereby order and require the said defendant, C.D., personally to be and appear before G.H.,

the referee by me hereby appointed for that purpose, at his office, in, in the County of, on the day of, 18.., at o'clock in the noon of that day, to answer concerning his property; and that a copy of said affidavit and of this order be previously served upon said defendant, C.D.

[DATE.]

[SIGNATURE.]

5. Order.—In the case of a judgment of a local court of another county, the order must be obtained from a county judge, (*Hersenheim v. Hooper*, 1 *Duer*, 594.) It is sufficient to confer jurisdiction, if it appear in respect to his residence that the execution was issued to the Sheriff of the County where he then resided and had a place of business, and the order must be made returnable "within the County to which the execution was issued." (14 *Abb. Pr.* 251; *Jesup v. Jones*, 32 *How. Pr.* 191.) As to the practice in New York, in procuring an order for the examination of third persons, see (*N.Y. Code*, § 292; see, also, 17 *Abb. Pr.* 1; 15 *Id.* 373; *Gibson v. Haggerty*, 37 *N.Y.* 555; *Lynch v. Johnson*, 46 *Barb.* 56.) The issuing and service of an order creates no lien as against other creditors who in the meantime discover other property subject to execution and levy upon the same. *Becker v. Torrance*, 31 *N.Y.* 631; consult *Voohees v. Seymour*, 26 *Barb.* 569.

6. Order Forbidding Debtor to Transfer.—The Judge who makes an appointment of a receiver may make an order forbidding the debtor to transfer any debts or make other disposition of them until an opportunity be given the receiver to sue. (5 *How. Pr.* 446; 9 *N.Y. Leg. Obs.* 245; *Ball v. Goodenough*, 37 *How. Pr.* 479.) And on violation of the order he is liable to punishment, as for a contempt. *People ex rel. Noel v. Kingsland*, 3 *Keyes*, 325; 5 *Abb. Pr. (N.S.)* 90.

7. Order for Payment.—An order requiring the application of property to the payment of a judgment may be in the alternative, that the defendant pay over, or that an attachment issue. (*Crouse v. Wheeler*, 33 *How. Pr.* 337.) Such orders are discretionary, and an

order denying an application for them is not appealable. *Joyce v. Holbrook*, 7 *Abb. Pr.* 338.

8. Service of.—To support an appointment of a receiver, where the debtor has not appeared, the order must have been personally served. 4 *How. Pr.* 178; 5 *Id.* 29; *Bouker v. Johnson*, 4 *Abb. Pr.* 435.

No. 1058.

Order for Appearance of Bailee of Debtor]

[VENUE.]

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that A.B. has property of the judgment-debtor therein mentioned, and is indebted to him in an amount exceeding dollars, and that it is a proper case for this order, and on application of the plaintiff's attorney, I, the undersigned, Judge of the said District Court of the Judicial District of the State of, do hereby order and require the said C.D. personally to be and appear before E.F., the referee by me hereby appointed for that purpose, at his office, in, in the County of, on the day of, 18.., at o'clock in the noon of that day, to answer concerning any property of the said judgment-debtor in his possession, and concerning any debts due by him to the said judgment-debtor; and that a copy of said affidavit and of this order be previously served upon said defendant, and upon said A.B.

[SIGNATURE.]

[DATE.]

9. Contempt.—If any person, party, or witness disobey an order of the referee, properly made, in proceedings before him under this

chapter, he may be punished by the Court or Judge, for a contempt. (*Cal. Pr. Act*, § 245.) And it is contempt to refuse, on the ground that he is a witness attending on another court. (Page *v. Randall*, 6 *Cal.* 32.) The Court will not punish a debtor for contempt, in disregarding the order requiring an examination before a referee in supplementary proceedings, where the same plaintiff had obtained a previous order against him on the same judgment, which was outstanding and not disposed of. (*Brockway v. Brien*, 37 *How. Pr.* 270.) As to the proper method of obtaining the attendance of a witness upon a hearing in supplementary proceedings, consult (19 *How. Pr.* 560; *Brunnett v. Dutcher*, 3 *Abb. Pr. (N.S.)* 152.) If the Judge finds the defendant able to pay the judgment, and orders him to do so within a time specified, and also to pay the costs stated, the defendant, if he fails to comply, may be proceeded against as for a contempt. (*Brush v. Lee*, 6 *Abb. Pr. (N.S.)* 50.) For any disobedience to the order of the Judge out of court, the Court may punish by order to show cause or attachment. *Wickes v. Dresser*, 4 *Abb. Pr.* 93; compare *Wicker v. Dresser*, 14 *How. Pr.* 605; see "*Contempts*," *Post*, Chap. v.

10. Examination of Third Persons.—Sections 241, 242, and 243 of the California Practice Act, relating to proceedings supplementary to execution, do not authorize the Court to make an order for the application of property of the judgment-debtor in the hands of a third party to the satisfaction of a judgment, upon the mere affidavit of the plaintiff, without first examining the party alleged to have the property in his possession as to the truth of the allegation. The order to apply the property to the satisfaction of the judgment must be based upon the answer of the person alleged to have it in his possession, and such other testimony as may be adduced at the hearing in connection with his answer. The affidavit of the plaintiff merely serves as the basis of a proceeding to acquire jurisdiction of a party who was before a stranger to the action. *Hathaway v. Brady*, 26 *Cal.* 586.

11. Liability of Third Parties.—Where the defendant in an action, whose property had been attached by the Sheriff, deposited with the Sheriff a sum of money, in gold coin, in lieu of an undertaking to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the Sheriff and loaned out pending the litigation, and a note drawing interest taken therefor, payable to plaintiff's attorney: *Held*, that after plaintiff recovered judgment, the

persons who borrowed the money did not hold in the character of bailees of the Sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings supplementary to execution. (*Hathaway v. Brady*, 26 *Cal.* 586.) In order to bring a party within the terms of the 240th section of the Practice Act, there must be a judgment and an execution thereon against property, and the person making the payment must be indebted at the instant to him against whom the execution runs. *Brown v. Ayres*, 33 *Cal.* 525.

12. Satisfaction of Demand.—The plaintiff, after a verdict in his favor, and before judgment, assigned the cause of action and verdict. Judgment having been subsequently entered, defendant was garnisheed under the execution issued on other judgments against the plaintiff, and paid to the Sheriff the amount of the judgment in favor of the plaintiff against him, who applied the same upon the executions. *Held*, that the assignment was void, and that the payment by defendant to the Sheriff was a satisfaction of the judgment. *Lawrence v. Martin*, 22 *Cal.* 173.

13. Receiver may be Appointed.—In proceedings supplementary to execution, the Court has power, when it has all parties before it, to appoint a receiver, and order a note in the hands of a third person, a party to the proceeding, and payable to the judgment-debtor, or to such third person as trustee of the judgment-debtor, to be delivered up to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt. (*Hathaway v. Brady*, 26 *Cal.* 586.) As to proceedings therein, consult (4 *Paige*, 574; 6 *Id.* 29; 8 *Id.* 568; *Carth.* 124; *Cro. Eliz.* 582; 1 *Str.* 177; 3 *Sandf.* 605; *Kemp v. Hardings*, 4 *How. Pr.* 178; *Dorr v. Nixon*, 5 *Id.* 29; *Myres' Case*, 2 *Abb. Pr.* 476; *Todd v. Crooke*, 4 *Sandf.* 694; *People v. Hulburt*, 5 *How. Pr.* 446; *Smith v. Johnson*, 7 *How. Pr.* 39; *Bull v. Goodenough*, 37 *How. Pr.* 479; *Kennedy v. Thorp*, 3 *Abb. Pr. (N.S.)* 131.) The history of a receiver's powers under several statutes considered, *Hayner v. Fowler*, 16 *Barb.* 300; see *Porter v. Williams*, 9 *N.Y.* 142; *Edmonston v. McLoud*, 16 *N.Y.* 543.

14. Witnesses.—Witnesses may be required to appear and testify before the Judge or referee upon any proceeding under this chapter in the same manner as upon the trial of an issue. *Cal. Pr. Act*, § 242; see *N.Y. Code*, § 295.

1 . What Property may be Reached.—Supplementary proceedings are limited to reaching the property of the judgment-debtor, in his possession, or in the possession of another party which is conceded to belong to the defendant. The Judge has no power to try the question of title, where the property is in the hands of others who make claim to it. (1 *Hill*. 505; 10 *Abb. Pr.* 103; 40 *Barb.* 242; *Crounse v. Whipple*, 34 *How. Pr.* 333.) Property held in trust for the support of the judgment-debtor cannot be reached. (*Lockee v. Mabbett*, 2 *Keyes*, 457; *Campbell v. Foster*, 35 *N.Y.* 361.) But not property previously deposited in bank, under an account opened in his name "in trust." (3 *Keyes*, 325; *People ex rel. Noel v. Kingsland*, 5 *Abb. Pr. (N.S.)* 90.) The creditor can only reach moneys actually due, and not moneys to become due on a contingency or on an executory contract. (*McCormick v. Kehoe*, 7 *N.Y. Leg. Obs.* 184.) Nor property acquired after commencement of the proceedings. (*Caton v. Southwell*, 13 *Barb.* 335.) Nor the earnings accruing after the date of the order. (*Campbell v. Foster*, 16 *How. Pr.* 275.) Nor movables which the debtor assigned for the benefit of his creditors while the execution was in life in the Sheriff's hands. (9 *Cow.* 728; *Matrous v. Lathrop*, 4 *Sandf.* 700.) Nor a right of action for a mere tort. (*Ten Broeck v. Sloo*, 2 *Abb. Pr.* 234.) Nor the interest of the debtor as a *cestui que trust*. (*Scott v. Nevins*, 6 *Duer*, 672; *Stewart v. Foster*, 1 *Hill*. 505.)

CHAPTER III.

ARBITRATIONS AND AWARDS.

No. 1059.

Agreement of General Submission to Arbitration—Short Form.

[TITLE.]

We, the undersigned, mutually agree to submit, and do hereby submit, all our matters in difference, of every name or nature, to the award and decision of P.Q., R.S., and T.U., for them to hear and determine the same, and make their award in writing, on or before the day of next.

Witness our hands, this day of, 18...

[SIGNATURES AND SEALS.]

No. 1060.

Agreement of Special Submission to Arbitration.

Whereas a controversy is now existing and pending, between A.B., of, etc., and C.D., of, etc., in relation to certain mining claims and quartz mills, made by and between the said parties, at the Town of aforesaid, on the day of, last past:

Now, therefore, we, the undersigned, A.B. and C.D., aforesaid, do hereby submit the said controversy to the arbitrament of P.Q., R.S., and T.U., of, etc., or any

two of them; and we do mutually covenant and agree, to and with each other, that the award to be made by the said arbitrators, or any two of them, shall, in all things, by us, and each of us, be well and faithfully kept and observed; provided, however, that the said award be made in writing, under the hands of the said P. Q., R. S., and T. U., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on the day of next.

Witness our hands, etc.

[SIGNATURES AND SEALS.]

No. 1061.

Agreement to Determine Partnership Disputes by Arbitration.

This agreement, made and entered into this day of, 18 .., between A. L. of the first part, F. H. of the second part, and G. F. of the third part, all of the City of, County of

Whereas the said parties of the first and second parts were, for a long time prior to the day of, 18..., engaged and concerned together as co-partners, which partnership was dissolved.

And, whereas, for the purpose of compromising, finally ending, and absolutely determining all differences, controversies, actions, suits, debts, accounts, and demands whatsoever, had, made, moved, depending, arising, or accruing, or which at any time or times may be had, or by, or between said parties of the first and second parts, for or by reason or means of the accounts of said co-partnership, or of any matter or thing relating thereto, resulting therefrom, or otherwise howso-

ever, it has been covenanted by said parties to refer all such differences of accounts to the said party of the third part for arbitration and adjustment, and the said party of the third part has consented to become such arbitrator.

Now, this agreement witnesses, that the said parties of the first and second parts do hereby mutually covenant and agree, to and with each other, that the said party of the third part shall arbitrate, award, order, judge, and determine of and concerning all and all manner of actions, cause and causes of actions, suits, controversies, claims, and demands whatsoever, relating to or growing out of their co-partnership account, prior to the day of, 18 . ., and shall conclude such arbitration, and make, award, and deliver the same to either of said parties of the first or second part in three months from this day; and said parties of the first and second part mutually agree to abide by the said award in all things.

No. 1062.

Release to be Executed by Party to an Arbitration, when Required in the Award.

Know all men by these presents: That I, A. B., of the County of, for and in consideration of the sum of one dollar, to me in hand paid by C. D., of, and in pursuance of an award made by P. Q., R. S., and T. U., arbitrators between us, the said A. B. and C. D., and bearing date the day of, 18 . ., do hereby release and forever discharge the said C. D., his heirs, executors, and administrators, of and from all actions, cause and causes of

action, suits, controversies, claims and demands whatsoever, for or by reason of any matter, cause, or thing, from the begining of the world down to the day of, 18... [*Insert the date of submission.*]

In witness whereof, etc.

[SIGNATURES AND SEALS.]

No. 1063.

Report of Arbitrators or Referee on all the Issues.

[TITLE.]

This action having been referred to me, by order dated the day of, 18..., to hear and decide all the issues therein, I respectfully report:

That on the day of, 18..., the same was duly brought to trial before me, at my office in the [City] of, counsel for both parties attending, and evidence received, and thereupon I find the following facts:

- I.
- II.
- III.

I find as conclusions of law:

1.
2.
3.

And I therefore direct judgment to be entered for

C. D.,
Referee.

No. 1064.

Report of Arbitrators or Referee on a Part of Issues, or on an Account.

[TITLE.]

To the Court of:

A reference having been made to me, by order dated the day of, 18.., to in this action, I respectfully report:

That I have heard both parties, and find the annexed account to be correct:

[*Account.*]

[*Or, find the following facts: state them.*]

C. D.,

Referee.

1. Award Conclusive.—An award rendered upon a fair arbitration of a matter in dispute between two parties, and for a long time after concurred in, must be held to be conclusive. (*Jarvis v. Fountain Water Co.*, 5 *Cal.* 179.) The award of money is absolute and unconditional; but the award of releases is different, for they are concurrent acts, and neither party can compel the other to execute a release without the tender of a release by himself. (*Dudley v. Thomas*, 23 *Cal.* 365.) Where parties submit to an arbitrator, they are presumed to know that his award will be final; and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award. (*Montifiori v. Engels*, 3 *Cal.* 431.) An award is void which is not final and conclusive, and does not embrace all the matter submitted. *Talbott v. Hartley*, 1 *Cranch C. Ct.* 31; *Colcord v. Fletcher*, 50 *Me.* 398; *McCrary v. Harrison*, 36 *Ala.* 577.

2. Duty of Arbitrators.—It is the duty of arbitrators to pass upon the whole subject in controversy; and if the terms of the award render a further inquiry necessary to ascertain a sum to be paid, or an act to be done, it is void. *Porter v. Scott*, 7 *Cal.* 312.

3. Hearing.—Each party to an arbitration is entitled to an opportunity to be heard in the presence of the other, and to have reasonable time to produce witnesses and examine them. *Morewood v. Jewett*, 2 *Robt.* 496.

4. Invalid Awards.—A useless and invalid determination upon one item properly presented within the general terms of the submission must, on principle, be as fatal to the entire action of the arbitrators as an omission, intentional, to notice the item at all. (*Muldrow v. Norris*, 12 *Cal.* 331.) But the making of a new and supplementary paper, and attaching the same to the award, after it has been delivered, does not vitiate the original award, and may be treated as surplusage. (*Dudley v. Thomas*, 23 *Cal.* 365.) An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision. (*Walker v. Walker*, 1 *Wins (N.C.)* No. 1, 259.) An award bad in part may be enforced for the part that is good, if not attacked for fraud; and the matter is divisible. (*Muldrow v. Norris*, 2 *Cal.* 74; *Parmelee v. Allen*, 32 *Conn.* 115.) The award being void, a release of action, filed by one of the parties in pursuance of the submissions, is also void. (*Muldrow v. Norris*, 2 *Cal.* 74.) Instance of an award not void for uncertainty, *Carsley v. Lindsay*, 14 *Cal.* 390.

5. Jurisdiction.—It does not follow that because a matter in difference between parties may be submitted by them to arbitration, that a Court of record, or any other court, will thereby acquire jurisdiction of the subject matter in controversy or of the parties litigant, unless the agreement further stipulate that the submission and stipulation are filed with the Clerk, and the Clerk enter in his register of actions a note of the submission, with the names of the parties, the name of the arbitrator, etc., as required by the three hundred and eighty-second section of the Practice Act. (*Ryan v. Dougherty*, 30 *Cal.* 218.) The agreement of parties cannot divest courts of their proper jurisdiction. *Muldrow v. Norris*, 2 *Cal.* 74.

6. Judgment on Award.—Where a submission to arbitration is made an order of Court, under the Practice Act, the Clerk may enter judgment on the award, in due time, without any further order of the Court. (*Carsley v. Lindsay*, 14 *Cal.* 390; overruling 4 *Cal.* 1.) The report of a referee, and the award of an arbitrator, are in all essentials the same. (*Grayson v. Guild*, 4 *Cal.* 122.) The Statute must be pursued in the manner in which the submission is filed with the

Clerk and the motion made for judgment on the award. (*Heslep v. City of San Francisco*, 4 *Cal.* 1; *Carsley v. Lindsay*, 14 *Id.* 390.) And a consent to submit a matter to arbitration does not imply a consent that the party in whose favor the award is made may enter judgment upon it in Court as a matter of course. (*Gunter v. Sanchez*, 1 *Cal.* 45.) No judgment can be entered upon an award, unless the submission is proved by the affidavit of a subscribing witness. 6 *Hill*, 303; *Goodsell v. Phillips*, 49 *Barb.* 353; 3 *Abb. Pr. (N.S.)* 147; see *Matter of Shafer*, *Id.* 234.

7. Judgment, when Entered.—After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award shall be entered by the Clerk in the judgment book, and shall thereupon have the effect of a judgment. (*Cal. Pr. Act*, § 385.) If a judgment on an award is entered by the Clerk at the request of the party in whose favor it is rendered, within less than five days after the award is filed, and without notice to the other party, the prevailing party cannot afterwards question its validity on the ground that it was irregularly entered. *Hoogs v. Morse*, 31 *Cal.* 128.

8. Matters Submitted.—The rule is general that arbitrators must pass upon all matters submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general of all matters in controversy, without specification, it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void *in toto*, and be set aside upon a proper showing of the omission. *Muldrow v. Norris*, 12 *Cal.* 331.

9. Must be in Writing.—The submission shall be in writing, and may be to one or more persons. (*Cal. Pr. Act*, § 381.) When there are three arbitrators, all shall meet, but two of them may do any act which might be done by all. *Cal. Pr. Act*, §§ 529, 384; *Hobson v. McArthur*, 16 *Pet.* 82.

10. Notice.—An umpire must give notice of the time and place of his proceeding. *Thornton v. Chapman*, 2 *Cranch C. Ct.* 224; com-

pare *Masterson v. Kidwell*, 2 *Id.* 669; see *Sutz v. Sinthicum*, 8 *Pet.* 165.

11. Objections to Award.—Where an award is objected to on the ground that it embraces matters not in fact submitted, though within the general terms of the submission, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their authority. Without such showing the award will be sustained. (See *Blair v. Wallace*, 21 *Cal.* 317.) If the party in whose favor an award of arbitrators is made voluntarily takes judgment on the award, and then receives the amount of the judgment in satisfaction of it, this is a waiver of any errors or misconduct on the part of the arbitrators. (*Hoogs v. Morse*, 31 *Cal.* 128.) If the parties upon the trial before the arbitrators submit by mutual consent matters not included in the written submission, and the arbitrators try such matters, neither party, after publication of the award, can object that the award exceeded the submission. *Woods v. Page*, 37 *Vt.* 252.

12. Organization.—Before acting, they shall be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties, and to make a just award according to their understanding. See *Cal. Pr. Act*, § 384.

13. Power of Arbitrators.—Arbitrators shall have power to appoint a time and place for hearing, to adjourn from time to time, administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon. (*Cal. Pr. Act*, § 383.) And to award costs. (*Dudley v. Thomas*, 23 *Cal.* 365; *Jones v. Carter*, 8 *Allen*, 431.) The arbitrator must make his award within the time limited in the agreement, or both the arbitrator and Court lose jurisdiction of the case, unless the parties stipulate in writing to extend the time. (*Ryan v. Dougherty*, 30 *Cal.* 218.) Arbitrators have power to determine both the validity and amount of the claim in dispute. (*Colard v. Fletcher*, 50 *Me.* 398.) And after an award has been once made and delivered, the arbitrators cannot alter the same, even to correct mistakes, without the consent of the parties. (*Russ. on Arb.* 135; *Porter v. Scott*, 7 *Cal.* 312; *Dudley v. Thomas*, 23 *Cal.* 365.) They have no common law powers when appointed under the Statute. *Williams v. Walton*, 9 *Cal.* 145; *Bayne v. Morris*, 1 *Wall. U.S.* 97; *Talbott v. Hartley*, 1 *Cranch C. Ct.* 31.

14. Principles of Determination.—Arbitrators, under a gen-

eral submission, are not bound to decide according to direct law; but where they intend to decide according to law, a mistake apparent on the face of the award is fatal. (*Muldrow v. Norris*, 2 *Cal.* 74.) If arbitrators state the reasons of their award, it will be presumed they intend to decide according to law. *Id.* 79.

15. Setting Aside Award.—Courts of equity, in the absence of statutes, will set aside awards for fraud, mistake or accident; an award may be set aside for a mistake of law, when it appears on the face of the award. (*Muldrow v. Norris*, 2 *Cal.* 74.) Where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission, and must be set aside. (*Pierson v. Norman*, 2 *Cal.* 599.) If the arbitrator rules upon questions of law, and refers the whole matter to the Court for revision, and it is found that he mistook the law, his report will be set aside. (*Cushman v. Wooster*, 45 *N.Y.* 410; *Pulliam v. Pensoneau*, 33 *Ill.* 375.) The Court will not disturb the award of an arbitrator unless the error complained of, whether of law or fact, appear on the face of the award. (*Tyson v. Wells*, 2 *Cal.* 122; overruled, as to a report of a referee, in *Cappe v. Brizzolara*, 19 *Cal.* 607.) That the arbitrator did not act upon all the items or property of a partnership is no ground for vacating his award. Certainly not, if the facts were not brought before him. (*Carsley v. Lindsay*, 14 *Cal.* 390.) So, an award cannot be impeached because contrary to law and evidence. As to when an award may be impeached, see (*Cal. Pr. Act*, § 386; see *Valle v. Northern Missouri R.R. Co.*, 37 *Mo.* 445.) A motion to set aside an award cannot be made, even with the consent of both parties, later than one term after the award has been published. *In Re N. Brit. R.R. Co.*, *Law Rep.* 1 *C.P.* 401.

16. Revocation.—An agreement to submit matter to arbitration is, both at law and in equity, revocable before the award is given; (8. *Code R.* 81, *b.*; 7 *East*, 607; 1 *Bing.* 89; 5 *Taunt.* 542;) and it cannot be made irrevocable by agreement of parties. (*Tobey v. The County of Bristol*, 3 *Story C. Ct.* 800.) Otherwise, *it seems*, of a submission by rule of court. *Masterson v. Kidwell*, 2 *Cranch C. Ct.* 669.

17. Stipulation.—A stipulation in the submission that neither party should appeal, and a power of attorney to confess judgment pursuant to the award, will not bar an appeal from a judgment on the award; especially under our system, where law and equity are

blended together. (*Muldrow v. Norris*, 2 *Cal.* 74.) Where the parties entered into a submission to arbitration, in which it was stipulated that the award be entered as the judgment of the County Court: *Held*, that it was void *in toto*, that Court having no jurisdiction over the subject matter of the award. *Williams v. Walton*, 9 *Cal.* 142.

18. Submission in Particular Cases.—One partner cannot bind his co-partner by a submission of partnership matters to arbitration; (*Karthauss v. Ferrer*, 1 *Pet.* 222;) but such a submission would be good against the partner agreeing to it. (*Jones v. Bailey*, 5 *Cal.* 345.) Whenever parties may by their own act transfer real property or exercise any act of ownership with regard to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement. (*Blair v. Wallace*, 21 *Cal.* 317.) When an agreement in writing is entered into under the three hundred and eightieth section of the Practice Act, to submit questions of difference relative to the partition of lands to the award of arbitrators, and the arbitrators meet and make their award, a court of equity will decree a specific performance of the award. (*Whitney v. Stone*, 23 *Cal.* 275.) Even though the party refusing to perform should agree to pay the penalty agreed on. (*Id.*) If the submission provide that an award upon the matters submitted be made, or the condition of the bond be that the parties are bound, provided the award of such matters be made, then such proviso extends to all the matters submitted, and operates to render the submission conditional and the award binding only in case the arbitrators pass upon every subject either specially referred to them or brought to their notice under the general terms of the submission. (*Muldrow v. Norris*, 12 *Cal.* 331.) An equitable claim against the estate of a deceased person may be referred. *White v. Story*, 43 *Barb.* 124.

19. Umpire.—When matters in dispute are submitted to arbitration, with power for the arbitrators to appoint an umpire, the arbitrators have a right to select the umpire, either before or after the investigation of the matter has commenced, even though the articles of submission contain a clause providing for such selection in the event of a disagreement between the arbitrators. (*Dudley v. Thomas*, 23 *Cal.* 365.) An umpire is not to be called in until the original arbitrators have differed, and then only to decide the points on which they differ. (*Traverse v. Beall*, 2 *Cranch C. Ct.* 113.) An umpire must hear the

parties. His award made on the statement of the arbitrators is not binding. *Taber v. Jenny, Sprague*, 315.

20. Who may Submit to Arbitration.—Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification shall not include questions relating merely to the partition or boundaries of real property. (*Cal. Pr. Act*, § 380; *Higgins v. Kenneady*, 20 *Iowa*, 474; *Ryan v. Dougherty*, 30 *Cal.* 218.) This Statute is but a re-affirmance of the common law, and gives to the parties no higher rights than they might have asserted in a court of equity in case of mistake, fraud or accident. (*Muldrow v. Norris*, 2 *Cal.* 74; *Same Parties*, 12 *Cal.* 331; *Peachy v. Ritchie*, 4 *Cal.* 205; *Blair v. Wallace*, 21 *Cal.* 317.) In partnership matters, see (*Jones v. Bailey*, 5 *Cal.* 345; *Karthauss v. Ferrer*, 1 *Pet.* 222; distinguishing *Lyle v. Rodgers*, 5 *Wheat.* 394; *McCormick v. Gray*, 13 *How. U.S.* 34; *Brink v. New Amsterdam Fi. Ins. Co.*, 5 *Robt.* 104.) In partition of lands, (*Whitney v. Stone*, 23 *Cal.* 275; see, also, *Blair v. Wallace*, 21 *Cal.* 317.) An attorney at law, as such, has authority to refer to arbitration a suit in which he is employed. (*Holker v. Parker*, 7 *Cranch*, 436; *Alexandria Canal Co. v. Swann*, 5 *How. U.S.* 83; and see *Green v. Darling*, 5 *Mas.* 201.) Case where an agent submitted to arbitration the question of damage done to land owned by the wife of his principal, *Smith v. Sweeney*, 35 *N.Y.* 291.

CHAPTER IV.

CONFESSION OF JUDGMENT.

No. 1065.

Statement and Confession of Judgment.

[TITLE.]

I, C. D., defendant in the above entitled action, do hereby confess judgment therein, in favor of A. B., the plaintiff in the said action, for the sum of dollars, and authorize judgment to be rendered therefor against me, with legal interest thereon from this date.

This confession of judgment is for a debt justly due and owing to the said plaintiff, arising upon the following facts, to wit: [*state facts specifically, with circumstances, date, place, etc.*]

[SIGNATURE.]

State of ,
County of] ss.

C. D., being duly sworn, deposes and says as follows:

I am the person who signed the above statement, and I am indebted to the said A. B. in the sum of dollars in said statement mentioned; and the facts stated in the above confession and statement are true.

[SIGNATURE.]

[*Furat.*]

NOTE.—Under the United States Bankrupt Act, the practice relating to the rights of creditors, where the debtor confesses judgment in favor of one only, is changed; for under that law the confession of judgment is of itself an Act of Bankruptcy, where there are other creditors; and hence actual fraud in making the confession, or irregularity in the proceedings, are not essential to put the debtor into involuntary bankruptcy. It is a proceeding which the law does not tolerate. A debtor's *whole* estate must go to *all* his creditors; he cannot voluntarily prefer some at the expense of others; this changes the rule under our State practice.

1. Collateral Attack.—Where a judgment was rendered by confession in open Court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot, at the instance of one not a party to the judgment, be invoked to set aside, or show the judgment was a nullity. (*Cloud v. El Dorado Co.*, 12 Cal. 133.) Case where judgment by confession was attacked by a creditor as fraudulent against him. (*Cordier v. Schloss*, 12 Cal. 143; see, also, *Meeker v. Harris*, *Id.* 218; *Same Parties*, 19 *Id.* 278.) A reference, with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment roll in the case, and whether the same was filed in the Clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to the referee the question as to what amount, if any, is still unpaid in the judgment. (*Solomon v. Maguire*, 29 Cal. 227.) Where judgment is taken by confessee in good faith and for value, it cannot be impeached for fraud between other parties. (*Kirby v. Fitzgerald*, 31 N.F. 417.) To be vacated, judgment must be wholly void. One insufficient item will not avoid it, if the rest be good. (*Frost v. Koon*, 30 *Id.* 428.) Judgment cannot be impeached by attaching creditor; only by holder of junior judgment. *Bentley v. Goodwin*, 15 Abb. Pr. 82.

2. Form.—As to the form of statement on confession of judgment, in the case of money lent, see (*Union Bank v. Bush*, 36 N.F. 631.) For goods sold, see (*Grandall v. Finn*, 1 *Keyes*, 217; S.C., 33 *How. Pr.* 444.) If a statement is sufficiently explicit, within the language and meaning of the Code, the omission of a schedule therein referred to as "annexed" will not invalidate the judgment. (*Clements v. Gerow*, 1 *Keyes*, 297.) The Supreme Court has power to amend a statement and confession of judgment. 27 N.F. 300; *Union Bank v. Bush*, 36 N.F. 631.

3. Insufficient Statements.—A statement for confession of judgment, to the effect that the indebtedness is upon a note, etc., is insufficient. So, where the statement is that the indebtedness is for goods sold and delivered, and money had and received, it is insufficient in this, that it does not show the kind or quantity or price of the goods, or time of sale, or when the money was received, or under what circumstances, or how much of the indebtedness is for money and how much for goods; and the judgment confessed is *prima facie* fraudulent. (*Cordier v. Schloss*, 18 Cal. 576; see, also, *Wilcoxon v. Burton*, 27 Cal. 233.) For cash loaned, without giving particulars of loans, was held insufficient. (*McDowell v. Daniels*, 38 Barb. 143.) So, for balance of account, without stating any facts as to sales out of which it arose. *Miller v. Earle*, 24 N.P. 110, 112.

4. Joint Debtor.—A judgment by confession of one joint debtor will not reach the joint property, but be effective only against him who authorizes its entry, as such a judgment (*Nev. Pr. Act*, § 32) is unauthorized. *Flanner v. Anderson*, 4 Nev. 437.

5. Judgment-Creditor, Proceedings by.—A judgment-creditor, made such by confession of judgment, who seeks to reach money in the hands of the junior judgment-creditors, upon the ground that he has a prior lien upon the same, must aver in his complaint that at the time his judgment was rendered the amount for which it was rendered was unpaid and due. *Denver v. Burton*, 28 Cal. 549.

6. On Award.—A judgment may be entered by confession for the amount specified in the award, in the same way that it may for the sum mentioned in a bond, note, or other instrument, but that is a judgment by confession. *Gunter v. Sanchez*, 1 Cal. 48.

7. Promissory Note.—Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which new interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors. (*McKenty v. Gladwin*, 10 Cal. 227.) As to sufficiency of statement on a promissory note, see (*Acker v. Acker*, 1 Keyes, 291.) That notes specified were given for purchase of a described indebtedness, without specifying original consideration, was held sufficient. *Kirby v. Fitzgerald*, 31 N.P. 417.

8. Setting Aside Confessions.—An application by a defend-

ant, or by a judgment-creditor, to set aside his confession of judgment, should show that the claim was not just, and that the judgment ought not to have been confessed. (*Arrington v. Sherry*, 5 *Cal.* 513.) A junior judgment-creditor has no right to join with the defendant in such application. (*Id.*) In a suit to set aside a judgment confessed by a party to defraud his creditors, it is not necessary that plaintiff should be either a judgment- or execution-creditor. A lien acquired by attachment suffices. A slight mistake in the computation of interest, the date being given, is no evidence of fraud. (*Scales v. Scott*, 13 *Cal.* 76.) It is not necessary to annex a statement on which a confession of judgment is rendered in a proceeding to set aside the confession upon the ground of insufficiency of such statement. *Vannice v. Greene*, 14 *Iowa*, 262.

9. Several Judgments.—Where the same fraudulent debtor confesses several fraudulent judgments in several courts, it would be necessary for a creditor to bring a different suit in each different court. (*Uhlfelder v. Levy*, 9 *Cal.* 607.) In such cases, the question of fraud, if there be any proof, is for the jury, otherwise for the Court. *King v. Davis*, 34 *Cal.* 100.

10. Sufficiency of Statement.—Object of statute defined. Intention to require debtor to state enough of facts to enable creditors to inquire into the transaction. (*McDowell v. Daniels*, 38 *Barb.* 143.) General specification of loans, and purposes for which they were made, was held sufficient. (*Frost v. Koon*, 30 *Id.* 428.) So, a general statement that indebtedness was in respect of sale of interest in partnership property. (*Thompson v. Van Vechten*, 27 *Id.* 568.) Confession sustained stating facts sufficient to sustain liability by necessary implication. (*Read v. French*, 28 *Id.* 285.) Confession specifying consideration of notes in general terms upheld. (*Ely v. Cooke*, *Id.* 365; *Kellogg v. Cowing*, 33 *Id.* 408.) So as to facts as to numerous sales, conducing to a balance, for which judgment confessed. (*Neusbaum v. Kiem*, 24 *Id.* 325; see, also, *Curtis v. Corbit*, 25 *How. Pr.* 58.) So as to general statement as to notes indorsed for accomodation of confessor. *Hopkins v. Nelson*, 24 *N.P.* 518.

11. Void Judgments.—A judgment confessed for the purpose of hindering, delaying, or defrauding creditors, is void as to such creditors. (*Ryan v. Daly*, 6 *Cal.* 238; *Scales v. Scott*, 13 *Id.* 76.) Under the Practice Act of 1850, a judgment by confession is invalid, unless the instrument authorizing its entry is signed by each of the persons against

whom it authorizes judgment to be entered. (*Chapin v. Thompson*, 20 *Cal.* 681; *Richards v. McMillan*, 6 *Id.* 419; *Cordier v. Schloss*, 18 *Id.* 576.) See, generally, the United States Bankrupt Act, which has changed the entire practice, under which no confession of judgment is good as against creditors, subjecting the debtor to involuntary bankruptcy. Confession by married woman absolutely void. (*Watkins v. Arahamis*, 24 *N.Y.* 72.) See, however, as to refusal of relief to her, on motion, under inequitable circumstances, *Knickerbacker v. Smith*, 16 *Abb. Pr.* 241.

CHAPTER V.

CONTEMPT OF COURT.

1. Contempt is defined by the Statute to be the disobedience or resistance of a lawful order of the Court or Judge; and if a court having jurisdiction should issue an erroneous order, a disobedience of it is a contempt. (*Ex parte Cohen*, 5 *Cal.* 494.) Any publication pending a suit, reflecting either upon the Court, the jury, the parties, the counsel, etc., with reference to the suit, or tending to influence the decision of the cause, though not aspersive of the Court, is a contempt. (*Hollingsworth v. Duane*, *Wall. C. Ct.* 100; and see *United States v. Duane*, *Id.* 102.) See, as to order to execute a release or conveyance, (*Morris v. Walsh*, 9 *Bosw.* 636.) The above is an early authority, and will hardly stand the test of the more recent and more liberal decisions. To call another a liar, in the presence of the Court, and in the hearing of its officers, is a contempt. Violent language and an assault made, in a hall adjoining a court room, and within the hearing

of the Court, it then being in session, is a contempt, which the Court may punish, within the meaning of the Act. *United States v. Emerson*, 4 *Cranch C. Ct.* 188.

No. 1066.

Commitment for Contempt for Disrespectful Language.

[TITLE.]

The People of the State of California,

To the Sheriff of County, greeting:

Whereas, an action was duly commenced in the said Court on the day of, 18.., between A.B., as plaintiff, and C.D., as defendant, for the purpose of [*state purpose of the action*], and was regularly pending in said Court on the day of, 18..; and whereas, on that day, during the hearing of said action, and in the presence and hearing of said Court, while said Court was in session, R.N., a witness summoned in said action [*or the plaintiff, or defendant, or counsel, or a by-stander, or otherwise, as the case may be*], did publish, utter, and say aloud and in the hearing of the Court and others that [*here insert disrespectful, or contemptuous language*], of and concerning said Court, with the view, on the part of the said R.N., to bring this Court and its proceedings in said action into contempt, and that such misconduct did, in fact, impair, hinder, and prejudice the rights and remedies of A.B., the plaintiff [*or of C.D., the defendant*], in said action, and did, in fact, interrupt, impede, and hinder the course of justice in the hearing and deliberation of the Court in said action, and that the said R.N. thereby had become liable to punishment for said dis-

respectful and contemptuous language, pursuant to Section 493 of the California Practice Act; and whereas the said Court did, at the same time by its order, then duly entered, adjudge and declare that the said R.N. had been guilty of a contempt of said Court by the use of said disrespectful and contemptuous language, and did order that the said R.N. be punished for his said contempt by imprisonment in the common jail of County, for the term of days.

Now, therefore, you are required and commanded, and we do warrant and enjoin you that you forthwith attach the said R.N., and commit him to the common jail of County, and detain him there for the term of days, as a punishment for his said contempt of the Court, and for such arrest, imprisonment, and detention, this shall be your sufficient warrant.

Witness the Hon. J.C., Judge of the Court, at the City Hall in the City and County of, this day of 18...

[SIGNATURE.]

By the special order of the Court.

[SIGNATURE OF CLERK.]

2. Commitment should State.—A commitment for contempt, for refusing to obey an order of Court, commanding the imprisonment of the party in contempt, until he shall comply with the order, should set forth that it is in the power of the party to comply. (*Ex parte Cohen*, 6 Cal. 318; *McCartan v. Van Syckel*, 10 Bosw. 694.) Though courts are exclusive judges of their own contempts, still a party cannot be imprisoned for neglecting or refusing to do what it appears it is out of his power to perform. (*Adams v. Hackett*, 6 Cal. 316.) It is a contempt for a party to refuse to obey or answer the writ, on the ground

that he is a witness attending on another court. Page *v.* Randall, 6 *Cal.* 32.

3. Disobedience of Process.—Where the process of a court, as an execution commanding the Sheriff to deliver possession of a chattel, has *been finally and completely executed*, the power of the Sheriff under it, and the authority of the Court to enforce it, cease; and a wrong doer afterwards trespassing upon the person thus put in possession cannot be deemed guilty of contempt for disobedience to the process of the Court. *Loring v. Illsley*, 1 *Cal.* 24.

4. Evidence of Contempt.—When the contempt is not committed in *facie curiæ*, it must be proved by affidavits from persons who witnessed it. (7 *Dane Abr.* 307.) A clear case must be shown. (*In re Judson*, 3 *Blatchf.* 148.) As to Court not hearing collateral evidence, see (*United States v. Dodge*, 2 *Gall.* 313; and, see *Thornton v. Davis*, 4 *Cranch C. Cl.* 500.) Where the facts which are supposed to establish misconduct in an attorney are susceptible of explanation showing them consistent with professional propriety, the District Court has no power to adjudge the attorney guilty of contempt, and to strike him from the rolls, without affording him an opportunity for explanation. (*Fletcher v. Daingerfield*, 20 *Cal.* 427.) No intendments of material facts should be indulged in. *Matter of Metcalf v. Messenger*, 46 *Barb.* 325.

5. Injunction, Violation of.—When an injunction, granted on an *ex parte* application, was modified on motion of defendant without notice to plaintiff, on defendant's giving bond: *Held*, that subsequent acts of defendant, in violation of the original injunction, were not in contempt. The remedy of the plaintiff, if there were error in the order modifying the injunction, is by appeal, but he cannot have a *mandamus* to compel the issuance of attachment for contempt. (*Fremont v. Merced Min. Co.*, 9 *Cal.* 18.) That a violation of an injunction, induced by the stratagem of the plaintiff, is not ground for an attachment, (*Sparkman v. Higgins*, 2 *Blatchf.* 29.) Where the District Court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon plaintiff asked for an attachment for contempt, which was refused, on the ground that the appeal superseded the injunction: *Held*, that a *mandamus* may issue to compel the District Judge to issue the attachment, the plaintiff's remedy by appeal being inadequate. (*Merced Min. Co. v. Fremont*, 7 *Cal.*

130.) The District Court alone has jurisdiction to try and punish for a contempt for the violation of an injunction issued out of the District Court. (*People v. County Judge of Placer Co.*, 27 *Cal.* 151.) See cases where defendant was held liable for contempt in cases of violation of injunction: *Ewing v. Johnson*, 34 *How. Pr.* 202; *Batterman v. Finn*, 32 *How. Pr.* 501; see, also, 15 *How. Pr.* 81; 9 *N.Y.* 263; *Wheeler v. Gilsey*, 35 *How. Pr.* 139.

6. Jurisdiction.—Every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency and silence in its presence; and in such case may apprehend and punish an offender without further examination or proof; but where the offense is committed out of Court, the party is entitled to a notice and a hearing in his defense. (*Ex parte Field*, 1 *Cal.* 187.) So of authority to punish a counsel for interrupting the proceedings at the trial. (*Heerdt v. Westmore*, 2 *Robt.* 697.) The district courts have jurisdiction to punish for contempts of their process, and to such writs as are necessary to the exercise of that jurisdiction. (*Ex parte Cohen*, 5 *Cal.* 494; *Pitt v. Davison*, 37 *N.Y.* 235.) This power was designed not only to protect the Court from contempt of its authority, but to give a party injured an additional remedy in the action for the restoration of what he was entitled to by the judgment. (*People v. Dwinelle*, 29 *Cal.* 632.) The jurisdiction to commit for contempt is derived from the original order in which the proceedings are founded, not from the order to show cause why the party should not be punished. (*Myers v. James*, 3 *Abb. Pr.* 301.) Copies of the affidavits upon which the application is founded should be served with the attachment on the order. (*Matter of Smethurst*, 2 *Sandf.* 724.) A judge out of court cannot punish as for contempt a disobedience of an order made by him in a statutory proceeding, unless authority so to punish is expressly conferred by law. (*People v. Brennan*, 45 *Barb.* 344.) A county judge cannot punish for a contempt in refusing to obey a subpoena issued from the Supreme (in California the District) Court, and attested in the name of one of its justices. *People ex rel. Brunett v. Dutcher*, 3 *Abb. Pr. (N.S.)* 151.

7. Non-Compliance with Mandamus.—An attachment will not be issued against a district judge for non-compliance with a writ of *mandamus*, by which he was directed to vacate an order expelling the relator from the bar, and reinstate him in his office of attorney, when it does not appear from the papers on which the motion for the attach-

ment is founded that any application has been made to the Court to vacate the order as commanded by the writ of *mandamus*, and where it appears that, so far as the action of the Judge in *vacation* is concerned, he has in substance complied with the command of the writ of *mandamus*; and in such case, it will not be deemed a disobedience of the writ that the Court has again expelled the relator for reasons alleged to have arisen after the issuing of the writ. (*Ex parte* Field, 1 Cal. 188.) So, for not having obeyed a peremptory writ of *mandamus*, where this has been adjudged superseded by a writ of error. *United States v. Kendall*, 5 *Cranch C. Ct.* 385.

8. Order, how Reviewed.—A commitment for contempt for refusing to obey an unlawful order of Court can be reviewed and set aside by a superior court. (*Ex parte* Rowe, 7 Cal. 181.) Where an order was made by the District Court of the Eighth Judicial District, whereby A. was ordered to be imprisoned forty-eight hours and fined five hundred dollars, for contempt of Court, without setting forth any of the facts whereon the order was based: *Held*, that a *certiorari* should issue to remove the proceedings for review into this court; and *held, further*, that a *mandamus* was not a proper remedy in such case. (*People v. Turner*, 1 Cal. 152; see *Ex parte* Field, 1 Cal. 188.) It is the right and duty of the Supreme Court, on *habeas corpus*, to review the decisions of inferior courts, in cases of contempt, as well as in others. *Ex parte* Rowe, 7 Cal. 181.

9. Order Conclusive.—The law regards the substance more than the form, and where the proceeding, though in form a case of contempt, is in substance a private right, the appellate court will compel the court below to issue an attachment to punish a contempt. (*Merced Mining Co. v. Fremont*, 7 Cal. 130.) Every Court empowered to punish for contempt is not the sole and final judge in all cases of alleged contempt. *Ex parte* Rowe, 7 Cal. 175.

10. Order of Court.—An order of Court, adjudging a party guilty of contempt, should always show upon its face the facts upon which the exercise of the power is based, and the adjudication is made. (*The People v. Turner*, 1 Cal. 152.) Whenever an order of the District Court, fining and imprisoning for contempt, does not specify on its face wherein the contempt existed, it will be reversed on *certiorari*. (*Ex parte* Field, *Id.* 187.)

11. Proceedings.—As to the proceedings in cases of contempt,

consult (*Cal. Pr. Act*, §§ 482 to 493.) The mode of proceeding to punish the editor of a newspaper for contempt, in publishing an article reflecting upon a court of justice, is: The prosecutor first proves by affidavit that the paper was published at the office of defendant, and that he is editor. Defendant is then called upon, by rule, to show cause why an attachment should not issue. On this rule he may controvert the fact, or defend on legal grounds. But if it appears that a contempt has been committed, an attachment will be directed, and where the defendant is brought in by it, he may demand that the prosecutor may file interrogatories, and if by his answers on oath he purges himself from criminality, he must be discharged. But interrogatories cannot be forced upon him. If he will not ask them, and the contempt is proved by affidavit or other testimony of the prosecutor, the Court will give judgment against him. (*Hollingsworth v. Duane*, *Wall. C. Ct.* 77; see *United States v. Duane*, *Id.* 102.) Where the plaintiff proceeded, under Section 239 of the Practice Act, to examine his judgment-debtor as to a judgment held by him against A., and after examination obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding. *Adams v. Hackett*, 7 *Cal.* 187.

12. Re-entry on Lands.—The district courts have jurisdiction to punish for contempt persons who re-enter upon a tract of land, after having been dispossessed therefrom by a judgment and process of a court of competent jurisdiction. (*People v. Dwinelle*, 29 *Cal.* 632.) A person against whom a judgment is recovered in ejectment, and who is removed from the land by a writ of restitution, is not guilty of contempt for re-entering on the land, if an event has occurred after the judgment, and before the re-entry, which confers upon him the right of possession. *People v. Dwinelle*, 29 *Cal.* 632; *Mahoney v. Van Winkle*, 33 *Cal.* 448.

13. Refusal to Pay Money.—Where, in the regular course of judicial proceedings before a court of general jurisdiction, a party having notice of the proceedings has been ordered by the judgment to pay a certain sum of money, and in default of obedience to the order has been committed for contempt, he cannot, on application to the Supreme Court for a writ of *habeas corpus*, question the *regularity* of the acts; the power of the Court below to make the order is the only question. (*Ex parte Perkins*, 18 *Cal.* 60.) In suit for divorce, the Court has power to order the husband to pay money to the wife for her support during the

litigation, and for counsel fees and other legal expenses; and such order may be enforced by imprisonment for contempt in case of refusal to pay. (18 *Cal.* 60.) Where a party to a divorce suit fails to pay money into the hands of the Clerk, upon an order of Court directing the payment, it seems an attachment may issue without summoning the party to show cause why it should not issue. (*Kernodle v. Cason*, 25 *Ind.* 362.) So, for the payment of alimony. *Ward v. Ward*, 6 *Abb. Pr. (N.S.)* 79

14. Service of Order.—In proceedings to punish the defendant for a contempt for refusing to comply with the judgment, personal service of the order to show cause why the defendant should not be punished, is not indispensable. (*Pitt v. Dawson*, 37 *N.F.* 235.) And interrogations are not necessary. (*Id.*) For proceedings in such cases, see, *Id.*

15. Supplementary Proceedings.—Interposing delays in supplementary proceedings, with the effect of defeating the creditor's attempt to reach the property, is a contempt of the order. (*Ross v. Clusman*, 3 *Sandf.* 667.) The refusal to apply property, though the defendant deny under oath that he had any, is a contempt. (*Matter of Pester*, 2 *Code R.* 98.) The power to punish for contempt in supplementary proceedings is not affected by the fact that the judgment was merely for costs. (*Brush v. Lee*, 6 *Abb. Pr. (N.S.)* 50.) See, also, as to supplementary proceedings. *Gerregain v. Wheelwright*, 3 *Abb. Pr. (N.S.)* 264.

16. Undertaking for Appearance.—Where a party has been arrested for a contempt, and has given bond, with sureties for his appearance at court, to abide the order of the Court, and has been adjudged to be guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the Statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. *Barton v. Butts*, 32 *How. Pr.* 456.

17. What Deemed Contempts.—The following acts or omission shall be deemed contempts: *First*, Disorderly, contemptuous, or insolent behavior towards the Judge whilst holding Court, or engaged in his judicial duties at chambers, or towards referees or arbitrators whilst sitting on a reference or arbitration, tending to interrupt the due course of a trial, reference or arbitration, or other judicial proceeding. *Second*, A breach of the peace, boisterous conduct, or violent disturb-

ance in presence of the Court, or its immediate vicinity, tending to interrupt the due course of a trial or other judicial proceedings. *Third*, Disobedience or resistance to any lawful writ, order, rule or process, issued by the Court or Judge at chambers. *Fourth*, Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness. *Fifth*, Rescuing any person or property in the custody of any officer by virtue of an order of process of such Court or Judge at chambers. (*Cal. Pr. Act*, § 480.) That to obtain an opinion of the Court affecting the rights of persons, not parties to the pretended controversy, would be punishable as a contempt, (*Lord v. Veazie*, 8 *How. Pr.* 251; *Cleveland v. Chamberlain*, 1 *Black.* 419.) That the Clerk may have an attachment for non-payment of his fees, see *Lee v. Patterson*, 2 *Cranch C. Cl.* 199.

No. 1067.

Commitment for Refusal to Testify.

[VENUE.]

The People of the State of California,
To A.P., Sheriff of the said County, greeting.

E.F. having this day been brought before me, on a warrant by me issued to compel his attendance to testify [*where the witness appears in pursuance of the subpoena, say*: having this day appeared before me, in pursuance of a subpoena by me issued, requiring him to appear and testify] touching the execution of a conveyance of real estate from K.B. to C.T., to which the said E.F. is a subscribing witness, as is said; and the said E.F., although required by me, having refused to answer upon oath [*if the commitment is made on account of the refusal of the witness to answer a particular question deemed pertinent by the officer, insert here, the following question, etc., specifying it particularly*] touching the execution of the said conveyance. You

are therefore commanded forthwith to convey the said E.F. to the jail of the said county, and there commit him to close custody in such jail, without bail, until he shall submit to answer on oath as aforesaid [*or* the question aforesaid], or be discharged according to law.

O. P.,

[DATE.]

County Judge of County.

18. Disobedience of Witness.—Disobedience to a subpoena, or a refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the Court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint may be dismissed or his answer stricken out. (*Cal. Pr. Act*, § 409.) So, the refusal of one party to give to the other party, within a specified time, an inspection and copy, or permission to take a copy of any book, document or paper, in his possession or under his control, containing evidence relating to the merits of the action or defense, may be punished as a contempt. (*Cal. Pr. Act*, § 446.) So of witness not producing books. (*Heerdts v. Wetmore*, 2 *Robt.* 697.) So of refusal to submit to examination. (*Woods v. De Figaniere*, 1 *Robt.* 607.) Witness fined and required to give security, in refusing to answer questions before Grand Jury, and insolence to them, *United States v. Caton*, 1 *Cranch C. Ct.* 150.

19. Refusal to Testify.—If an adverse party refuse to attend and testify at the trial, or to give his deposition before trial, or upon a commission when required, his complaint or answer may be stricken out and judgment be taken against him; and he may be also, in the discretion of the Court, proceeded against as in other cases for a contempt. (*Cal. Pr. Act*, § 420.) A statement that R. was committed for contempt in refusing to answer certain questions propounded to him by the Grand Jury is not a compliance with the section. The question asked should be set out. (*Ex parte Rowe*, 7 *Cal.* 181.) In such a case, the commitment should state that the Grand Jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness, and certain questions asked him, stating them; that he refused to answer; that the facts were thereupon presented to the Court by the

Grand Jury, and the prisoner required by the Court to answer, which being refused by the prisoner, he was committed for contempt. And this rule is based upon the power of an appellate court to review, on *habeas corpus*, the proceedings of an inferior in cases of contempt. (*Id.*) A party committed for refusing to answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on *habeas corpus*, where it appears that the suit has abated; there being no longer parties or subject matter before the Court, there is no longer a case in which the questions can be asked. (*Ex parte Rowe*, 7 Cal. 175.) It seems that the refractory witness might still be reached by attachment for the contempt, and by a judgment thereon. (*Id.*) When witnesses are brought before either branch of the Legislature, they may be compelled to testify by process of contempt, when without legal cause they refuse to do so. *Ex parte McCarthy*, 29 Cal. 395.

CHAPTER VI.

DEPOSIT IN COURT AND APPOINTMENT OF RECEIVER.

1. Deposit in Court may be made in the following cases, under the Practice Act: *First*, In arrest and bail, the defendant, at any time before execution, shall be discharged from arrest upon depositing the amount mentioned in the order of arrest; (*Cal. Pr. Act*, § 80;) or he may at the time of the arrest deposit the amount in the hands of the Sheriff, or, if the bail be reduced, may deposit the reduced amount instead of giving bail, and shall receive from the Sheriff a certificate of the deposit made, and he shall be discharged from custody. (*Id.* § 91.) The Sheriff shall then deposit the money in Court, giving a certificate to each of the parties. (*Id.* § 92.)

As to disposition of money on recovery of judgment, see *Cal. Pr. Act*, § 94.

2. Deposit in Court may be made, *Second*, In actions for the foreclosure of mortgages, after the sale of the property, if there be surplus money after payment of the amount due on the mortgage, lien or incumbrance, with costs, the Court may cause the same to be paid to the persons entitled to it, and in the mean time may direct it to be deposited in Court. *Cal. Pr. Act*, § 247.

3. Deposit in Court may be made, *Third*, In actions against steamers, boats and vessels, after the satisfaction of the execution by the application of the process of sale, *first*, to the payment of the amount of claims filed, and, *second*, to the payment of the judgment and costs and Sheriff's fees; if no appearance by the owner, master, or consignee has been made in the action, the Court shall direct a deposit of the balance in court. *Cal. Pr. Act*, § 329.

4. Deposit in court may be made, *Fourth*, In appeal, to render the appeal effectual for any purpose, appellant shall file an undertaking in the amount required by law, or such amount may be deposited in Court in lieu thereof; (*Cal. Pr. Act*, § 348;) and such deposit will be effectual as a stay of proceedings in the court below upon the judgment or order appealed from. *Cal. Pr. Act*, § 356.

5. Deposit in Court may be made, *Fifth*, A defendant, against whom an action is pending upon a contract or for specific personal property, at any time before answer, upon affidavit, with notice, may apply to the Court to substitute a third person in his place and dis-

charge him from liability to either party, on his depositing in court the amount claimed on such contract, or delivering the property or its value to such person as the Court may direct; and the Court may in its discretion make an order substituting a person in the place of the defendant, on the latter depositing in the Court the amount claimed on the contract. (*Cal. Pr. Act*, § 658.) So, a tenant may offer to pay the rents into Court to abide the ultimate decision of the case. *McDevitt v. Sullivan*, 8 *Cal.* 592.

APPOINTMENT OF RECEIVER.

6. Discretion of Court.—The appointment of a receiver rests in the sound discretion of the Court in view of all the facts; one of which is that the party asking the appointment should make out a *prima facie* case. *Copper Hill M. Co. v. Spencer*, 25 *Cal.* 15.

7. Distribution of Fund.—Money in the hands of a receiver is *in custodia legis* (*Adams v. Woods*, 8 *Cal.* 306), and can only be distributed by order of the Court; and no party can by adverse proceedings acquire a lien over it (*Adams v. Haskell*, 6 *Cal.* 475), or a preference. *Adams v. Hackett*, 7 *Cal.* 187; *Adams v. Woods*, 8 *Cal.* 152; 9 *Id.* 24; *Naglee v. Lyman*, 14 *Id.* 450. ♦

8. In Dissolution.—The transfer to a receiver by order of Court of the effects of an insolvent is not an assignment absolutely void under the Act of 1852, but only void against the claim of creditors. (*Naglee v. Lyman*, 14 *Cal.* 450.) Where it appears that the partners, parties to the suit for dissolution, held a judgment against a third party which was never reduced to the possession of the receiver, the appointment of the receiver would not operate as an assignment or transfer of any property not so reduced to possession within a reasonable time. *Adams v. Haskell*, 6 *Cal.* 475.

9. Order.—The pendency of a motion for a new trial does not operate as a stay of proceedings, so as to deprive the Court of the power of vacating an order appointing a receiver made before the trial. *Copper Hill M. Co. v. Spencer*, 25 *Cal.* 15.

10. Powers and Duties of Receiver.—In suit for a dissolution of a co-partnership, upon application, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held by partnership after paying judgment-creditor. (*Adams v. Hackett*, 7 *Cal.* 187.) Where he is authorized by the Court to prosecute suits for the recovery of assets, he is entitled to a credit for the amount expended in their prosecution; (*Adams v. Hackett*, 7 *Cal.* 187;) and may employ counsel for this purpose. (*Adams v. Woods*, 8 *Cal.* 315.) All reasonable and proper expenses incident to the receivership should be allowed. (*Adams v. Haskell*, 6 *Cal.* 475.) Generally, a receiver can pay out nothing without an order of the Court; but there are exceptions to this rule, nor will he be denied reimbursements in every case where he neglects to obtain such order, especially in equity courts. (*Adams v. Woods*, 15 *Cal.* 207.) Nor will it be presumed that the receiver has transcended his duties and taken possession of property to which he is not entitled. (*Whitney v. Buckman*, 26 *Cal.* 451.) As to the powers and duties of receivers in actions concerning mining claims, see *Cal. Pr. Act*, § 652.

11. When Appointed.—A receiver may be appointed: *First*, Before judgment, provisionally, on the application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property, which is the subject of the action, and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired. *Second*, After judgment, to dispose of the property according to the judgment, or to preserve it pending appeal. So, in an action to recover possession of real estate, and while a motion for new trial is pending, if the facts in the case are such as warrant it. (*Whitney v. Buckman*, 26 *Cal.* 451.) As, if defendant is receiving, monthly, large sums of money from the sale of waters of mineral springs on the land, and is insolvent. (*Id.*) Or, in case of a mining claim, where defendant remains in possession working the claim, and is insolvent. (*Hill v. Taylor*, 22 *Cal.* 191.) In proceedings supplementary to execution, the Court may appoint when it has all the parties before it. (*Hathaway v. Brady*, 26 *Cal.* 586.) And, *Third*, In such other cases as are in accordance with the practice of courts of equity jurisdiction. (*Cal. Pr. Act*, § 143.) If notice is given of an application for an injunction, the judge on the hearing may appoint a receiver, if the facts make out a proper case. *Whitney v. Buckman*, 26 *Cal.* 451.

12. When not Appointed.—A court of equity has no jurisdiction over corporations for the purpose of restraining their operations or winding up their concerns, and such courts cannot appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. (*Neall v. Hill*, 16 *Cal.* 148.) So, a receiver will not be appointed where the equities are fully denied by the answer. The withdrawal of property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally competent to manage the business, will not justify the appointment of a receiver. (*Williams v. Monroe*, 3 *Cal.* 385.) In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy v. Ide*, 6 *Cal.* 101.

13. Who may Appoint.—A receiver may be appointed by the Court in which the action is pending, or by a judge thereof. (*Cal. Pr. Act*, § 143.) And by the Justice of the Peace, in actions concerning mining claims. (*Cal. Pr. Act*, § 651.) Courts of equity have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents, and in proper cases to order the property delivered to the receiver. (*Ex parte Cohen*, 5 *Cal.* 494.) Under the Statute, the County Judge cannot appoint a receiver, in cases in the District Courts, at least not as distinct from the injunction. *Ran-thrauff v. Kresz*, 13 *Cal.* 639.

CHAPTER VII.

PROCEEDINGS ON OFFER TO COMPROMISE.

1. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the Clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence, and if the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but shall pay the defendants costs from the time of the offer. *Cal. Pr. Act*, § 390.

2. If judgment is entered upon the *cognovit* and by its authority, then the amount acknowledged would have been the sum of the judgment; but where, upon complaint and answer denying the allegations thereof, the acknowledgement issued as evidence, interest may be given by way of damages. (*Hirschfield v. Franklin*, 6 Cal. 607.) A *cognovit* is good as an admission *in pais* after answer is filed. *Id.*

3. The true meaning of the Statute (*Practice Act*, § 390) authorizing the Clerk to enter judgment upon an offer on the part of defendant to suffer judgment

for a specified sum, etc., is that he can enter judgment only when the offer is made after action is brought by the filing of the complaint, and while pending, and where a party hands to the Clerk the complaint, offer of judgment, and notice of acceptance of the offer, at the same time, and thereupon the Clerk enters judgment, it is void. *Crane v. Hirschfelder*, 17 *Cal.* 582.

4. If the defendant at any time before the trial offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and, if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery otherwise than as to costs, as above provided. *Cal. Pr. Act*, § 596.

CHAPTER VIII.

INSPECTION OF BOOKS, DOCUMENTS, ETC.

No. 1068.

Notice of Motion for Order of Inspection, etc., of Books, Documents, etc.

[TITLE.]

To C. D., defendant in said action:

SIR: You are hereby notified that the plaintiff herein will, on the day of, 18 .., at 10 o'clock A.M., or as soon thereafter as counsel can be heard, at the court room of said Court, in the City Hall at, in said county, move the Court for an order that you give to this plaintiff an inspection and copy of [*describe book, document or paper*], in your possession [*or under your control*], containing evidence relating to the merits of this action.

E. F.,

Attorney for Plaintiff.

1. Affidavit to Prove Loss.—In this State, the testimony may be given orally or offered by affidavit. Either course may be adopted, and either course will avail. (*Bagley v. Eaton*, 10 Cal. 126.) So, proof of loss of an instrument may be by the party's own affidavit, to lay a foundation for proving the contents. But the affidavit of a third person, that a trunk of the party containing his papers is lost, is insufficient, without showing that it contained the paper in question. But this the party may show by his own oath. (*McCann v. Beach*, 2 Cal. 25.) An affidavit, showing that the Surveyor-General has adopted a rule refusing to allow the original to be taken from the files, is a suffi-

cient predicate. (*Hensley v. Tarpey*, 7 *Cal.* 288.) An affidavit by a party to the suit, that the original deed is not in his possession or under his control, is sufficient to admit in evidence a certified copy from the Recorder's office, the deed having been properly acknowledged and recorded, and the grantee being a third person. (*Skinker v. Flohr*, 13 *Cal.* 638.) To introduce evidence of a writing altered in a material part, the party may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise. *Cal. Pr. Act*, § 448.

2. Altered Writing.—The party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. (*Cal. Pr. Act*, § 448.) Where a deed is produced, it is incumbent on the party to establish by satisfactory evidence that the alteration was made by the grantor or by his authority, or the deed will be deemed, for the purposes of the action, to read as it did before the alteration was made. (*Galland v. Jackman*, 26 *Cal.* 79.) A party offering a promissory note in evidence is not obliged, before the same is admitted, to account for an erasure appearing upon the face of it, unless the erasure has been made or appears to have been made after the execution of the instrument, and is on a part of the note which is material to the point in dispute. (*Corcoran v. Doll*, 32 *Cal.* 82.) So, on a printed form of note, where the erasure is made only as to the printed matter. *Id.*

3. Copies of Records as Evidence.—A copy of any record, document, or paper, in custody of a public officer of this State, or of the United States, within this State, certified under the official seal, or verified by the oath of such officer to be a true, full, and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the Courts of this State, in the like manner and with the like effect as the original could be if produced. (*Cal. Pr. Act*, § 655; see §§ 448, 449.) There is no attempt by this section to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit. (*Macy v. Goodwin*, 6 *Cal.* 579.) To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is sufficient that it is

directed by the proper officer to be kept. (*Kyburg v. Perkins*, 6 *Cal.* 674.) It is well settled that a certified copy of an instrument, duly recorded, may be read in evidence, without proof of the originals, if it be shown to the satisfaction of the Court that the original is not under the control of the party. (*Hicks v. Coleman*, 25 *Cal.* 122; *Hurlburt v. Butenop*, 27 *Cal.* 50; *McMinn v. O'Connor*, *Id.* 238; cited in *Mayor v. Mazeaux*, *Cal. Sup. Ct., Oct. T.*, 1869.) Alcaldes' records are on a footing with other records kept by the County Recorder, and a certified copy of an instrument found therein is admissible under the same circumstances as are certified copies of records made by himself, upon proof of the loss of or inability of the party to produce the original. (*Kyburg v. Perkins*, 6 *Cal.* 674; *Donner v. Palmer*, 31 *Cal.* 500; *Garwood v. Hastings*, *Cal. Sup. Ct., Jul T.*, 1869; citing *Touchard v. Keyes*, 21 *Cal.* 210.) A sworn copy or exemplification of instruments in the archives of the Government is evidence, and the originals ought not to be removed from the government offices. (*Gregory v. McPherson*, 13 *Cal.* 574.) Copy of deed, see *Young v. Emerson*, 18 *Cal.* 416.

4. Foreign State Records.—The records and judicial proceedings of the courts of any other State of the United States may be proved or admitted in the courts of this State, by the attestation of the Clerk and the seal of the court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding magistrate, as the case may be, that the said attestation is in due form. (*Cal. Pr. Act.*, § 450; *Parker v. Williams*, 7 *Cal.* 247; see *Dexter v. Paugh*, 18 *Cal.* 372.) The record of a judgment of another State, if certified in conformity with the Act of Congress, is admissible in evidence in this State. *Parke v. Williams*, 7 *Cal.* 247.

5. Foreign Record.—A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the Clerk, with the seal of the court annexed, if there be a clerk and seal; or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy of such record; together with a certificate of a judge of the Court, that the person making the certificate is the Clerk of the Court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and also, together with the certificate of the Minister or Ambassador of the United States, or of a consul of the United States, in such foreign country, that there is such a court, specifying generally the nature of its

jurisdiction, and verifying the signature of the Judge and Clerk, or other legal keeper of the record. (*Cal. Pr. Act*, § 451; and see § 452.) Such certificates are generally received as *prima facie* evidence of both the character of the officers giving them and the genuineness of their signatures. (*Mott v. Smith*, 16 *Cal.* 533.) So of a certificate of a notary public or United States consul. (*Id.*) Notaries and consuls of every grade, whether principal or inferior notary, or Consul General, or Vice Consul. *Id.*; see *Ely v. Frisbie*, 17 *Cal.* 250. *

6. Judicial Records.—A judicial record of this State, or of the United States, may be proved by the production of the original, or a copy thereof, certified by the Clerk, or other person having the legal custody thereof, under the seal of the Court, to be a true copy of such record. *Cal. Pr. Act*, §§ 449, 655.

7. Notice to be Given.—Any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper, in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. (*Cal. Pr. Act*, § 446.) As to form and sufficiency of notice, consult (*Burke v. Table Mt. Wat. Co.*, 12 *Cal.* 403.) Literal accuracy cannot be expected in the description of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document denied is enough. *Id.*

8. Order, Compliance.—If compliance with the order be refused, the Court may exclude the book, document, or paper from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the Court may also punish the party refusing for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers, or documents, when he is examined as a witness. *Cal. Pr. Act*, § 446.

9. Perpetuating Testimony.—For the rule of proceeding in the perpetuation of testimony in California, see *Cal. Pr. Act*, §§ 437-442.

10. Printed Statutes.—Printed copies, in volumes, of statutes, code, or other written law, enacted by any other State, Territory, or

foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the Courts and judicial tribunals of such State, Territory, or government, shall be admitted by the courts and officers of this State, on all occasions, as presumptive evidence of such laws. *Cal. Pr. Act*, § 453.

11. Seal, Impression of.—A seal of a court or public office may be impressed with wax, wafer, or any other substance, and then attached to the original or a copy thereof, or it may be impressed on the paper alone. (*Cal. Pr. Act*, § 454; *Connelly v. Goodwin*, 5 *Cal.* 220.) A scrawl, with "L. S." written within, is sufficient. (*Hastings v. Vaughn*, 3 *Cal.* 315.) See, as to certified copy of deed, *Jones v. Martin*, 16 *Cal.* 166; see, also, *Downer v. Palmer*, 31 *Cal.* 500; and cases there cited.

12. Secondary Evidence—Lost Papers.—There shall be no evidence of the contents of a writing, other than the writing itself, except, *First*, When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made. (*Cal. Pr. Act*, § 447, Subd. 1; *Bagley v. Admr. of Mickle*, 9 *Cal.* 430; *Grass Valley Quartz Min. Co. v. Stackhouse*, 6 *Cal.* 413; *Bagley v. Eaton*, 10 *Cal.* 126; *Landis v. Turner*, 14 *Cal.* 575.) The facts and circumstances of the destruction must be shown. (*Bagley v. Admr of Mc-Mickle*, 9 *Cal.* 430.) So, in suit by the assignee of a book account, the assignor is a competent witness to prove to the Court the loss of the book of original entries, as a preliminary to the introduction of secondary evidence of its contents. (*Caulfield v. Sanders*, 17 *Cal.* 569.) As to parol evidence to prove contents of instruments destroyed by fire, (*Collier v. Corbett*, 15 *Cal.* 183.) So, where the record book containing a judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment, and its contents. (*Ames v. Hoy*, 12 *Cal.* 11.) Proof that a notice upon a mining claim has been torn, and that the remaining portion is (as the witness thinks) illegible and defaced, is enough to introduce a copy of it. (*Dunning v. Rankin*, 19 *Cal.* 640.) But a copy of a notice posted on a mining claim, to show its extent, is not admissible in evidence, if the notice itself be attainable. (*Lombardo v. Ferguson*, 15 *Cal.* 372.) The proof of the loss of receipts, without proof of their genuineness, is not a sufficient predicate for the admission of evidence as to their contents. (*Reynolds v. Jourdan*, 6 *Cal.* 108.) The plaintiff also made

oath he had never had the deed. *Held*, to be insufficient to introduce parol proof of its contents. (Lawrence v. Fulton, 19 Cal. 683.) Where an original instrument, proved to be lost, has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for. (Brotherton v. Mart, 6 Cal. 488.) To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the Court. Smith v. Brannan, 13 Cal. 107.

13. Secondary Evidence—Possession of Adverse Party.

—There shall be no evidence of the contents of a writing other than the writing itself, except, *Second*, Where the original is in possession of the party against whom the evidence is offered, and he fails to procure it after reasonable notice. (Cal. Pr. Act, § 447, Subd. 2.) Where it is impossible to produce the paper between the time of giving the notice and the trial, that fact should be made to appear. (Burke v. Table Mountain Co., 12 Cal. 403.) Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so. (Poole and Wife v. Gerrard, 9 Cal. 593.) Parol proof of a written contract and assignment thereof in writing, not admissible, so as to charge the assignee, without notice to produce the original or account for its loss. Grimes v. Fall, 15 Cal. 63.

14. Secondary Evidence—Records and Public Documents.

—There shall be no evidence of the contents of a writing other than the writing itself, except, *Third*, When the original is a record, or other document, in the custody of a public officer. (Cal. Pr. Act, § 447, Subd. 3.) Certified copies of grants made by the Surveyor-General of the United States are inadmissible in evidence unless the absence of the original is accounted for. (Hensley v. Tarpey, 7 Cal. 288; Natoma Wat. and Min. Co. v. Clarkin, 14 Cal. 544.) The *expediente*, consisting of the petition, plot, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican Government, is as much an original document as the grant delivered to the grantee. (Gregory v. McPherson, 13 Cal. 562.) Where, to suit for goods sold and delivered, defendant pleads his discharge in insolvency: *Held*, that in support of his plea he can offer in evidence certified

copies of the decree, and of each of the papers composing the record of the insolvent proceedings, *separately*; and that these papers need not all be attached together, and the whole certified as one record. (*Gladstone v. Davidson*, 18 *Cal.* 41.

15. Secondary Evidence—Made by Statute.—There shall be no evidence of the contents of a writing other than the writing itself, except, *Fourth*, When the original has been recorded, and a certified copy of the record is made evidence by statute. (*Cal. Pr. Act*, § 447, Subd. 4; *McMinn v. O'Connor*, 27 *Cal.* 238.) The Act of 1851, Section twenty-first, gives to papers properly recorded the like effect as originals, but it does not dispense with proof of execution. (*Powell's Heirs v. Hendricks*, 3 *Cal.* 427.) Nor does it dispense with the production of the originals, if they can be obtained; it merely fixes the value of the copy as evidence, when it is necessary to be introduced, from the loss of the original. (*Mace v. Goodwin*, 6 *Cal.* 579; *McMinn v. O'Connor*, 27 *Cal.* 238.) A recorder need not transcribe the notarial seal to the acknowledgment of a deed where the certificate states that the seal was affixed. (*Jones v. Martin*, 16 *Cal.* 165.) A power of attorney, not affecting real estate, is not required to be recorded. (*Stevens v. Irwin*, 12 *Cal.* 306.) A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence, upon making statute proof that he never had control of the original, and that it is not in his power or control. (*Hurlburt v. Butenop*, 27 *Cal.* 50.) Or that they are lost. *Hicks v. Coleman*, 25 *Cal.* 129.

16. Secondary Evidence—Numerous Accounts.—There shall be no evidence of the contents of a writing other than the writing itself, except, *Fifth*, When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole. *Cal. Pr. Act*, § 447, Subd. 5.

CHAPTER IX.

SUBMITTING CONTROVERSY WITHOUT ACTION.

1. Parties to a question in difference which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which should have jurisdiction if an action had been brought. *Cal. Pr. Act, § 377.*

2. Judgment shall be entered in the Judgment Book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment shall constitute the judgment roll. (*Cal. Pr. Act, § 378.*) And may be enforced in the same manner as if it had been rendered in an action. *Cal. Pr. Act, § 379.*

3. Appeals may be taken from judgments in these as in other cases. (*Cal. Pr. Act, § 379.*) Where, instead of this affidavit, the record only showed an allegation in the agreed statement on appeal that the cause was heard in the court below on an agreed statement of facts, and the affidavit of the defendant that the controversy was real, the appeal was dismissed. (*Mel-lois v. Chaine, 20 Cal. 679.*) Where an appeal is taken from a decision of the Justice's Court in such a case, the transcript on appeal must contain a copy of the affidavit required by the same section, showing the

reality of the controversy and good faith of the proceeding. *Mellois v. Chaine*, 20 *Cal.* 679.

4. Proceedings.—Where the parties to a controversy make an agreed case, under the three hundred and seventy-seventh section of the Practice Act, which is submitted for decision to the District Court, the consideration of the Court is restricted to the facts submitted in the case. (*Crandall v. Amador County*, 20 *Cal.* 72.) Where the plaintiff claimed that defendant was indebted to him, and, under the section above referred to, a case was made and submitted stating the facts agreed upon between the parties, upon which the District Court decided that plaintiff's demand was not established without proof or other additional facts: *Held*, that it was error for the Court, instead of rendering judgment for the defendant, to make an order based upon the supposition that plaintiff established such other facts. *Id.*

CHAPTER X.

TAKING DEPOSITIONS.

1. The testimony of a witness, in this State, may be taken by deposition, in an action, at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases: *First*, When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended; *Second*, When the witness resides out of the county in which his testimony is to be used; *Third*, When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is

required; *Fourth*, When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend. *Cal. Pr. Act*, § 428.

2. Taking testimony by depositions is in derogation of the common law, and must only be done by the proper officer, and every requirement of law must be complied with. (*McCann v. Beach*, 2 *Cal.* 25.) All the requisitions of the Statute, in relation to the taking of depositions, must be strictly complied with; and this must appear upon the deposition, to entitle it to admission. (*Dye v. Bailey*, 2 *Cal.* 383.) The testimony of a party to an action may be taken by deposition, if he resides out of the county in which his testimony is to be used, although he resides within less than thirty miles of the place of trial. *Skidmore v. Taylor*, 29 *Cal.* 619.

3. **Before whom Made.**—Depositions in this State may be taken before any judge or clerk, or any justice of the peace or notary public. (*Cal. Pr. Act*, § 429.) So of affidavits to be used in this State. (*Id.* 424; *McCann v. Beach*, 2 *Cal.* 32.) An affidavit taken in another State of the United States, to be used in this State, shall be taken before a commissioner appointed by the Governor of this State to take affidavits and depositions in such other State, or before a judge of a court of record having a seal. (*Cal. Pr. Act*, § 425.) Any affidavit taken in a foreign country, to be used in this State, shall be taken before an ambassador, minister or consul of the United States, or before any judge of a court of record having a seal, in such foreign country. *Cal. Pr. Act*, § 426.

4. **Competency of Witness.**—To make the testimony of a witness admissible, he must be competent at the time of taking deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him. (*Kimball v. Gearhart*, 12 *Cal.* 27.) Where the parties stipulated that a deposition, which had been taken in another action, should be used on the trial, "with the same force and effect, subject to the same exceptions, as if taken in this case:"

Held, that the stipulation was a waiver of any objections to the competency of the witness. *Brooks v. Crosby*, 22 *Cal.* 42.

5. Diligence.—Diligence must be used in applying for a commission. (*Pierson v. Holbrook*, 2 *Cal.* 598.) Where a party applied for a continuance to enable him to take the deposition of an absent witness, and the proof which was designed to be obtained would constitute no defense to the plaintiff's claim, the application was properly rejected. (*Hawley v. Stirling*, 2 *Cal.* 470.) A party is bound to know the materiality of testimony, except in case of surprise at the trial. *Barry v. Metzler*, 7 *Cal.* 418.

6. How Taken.—As to how depositions must be taken, see (*Cal. Pr. Act*, § 430.) Where a deposition is taken *ex parte*, though after notice, and the witness is therefore not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it. (*Spring v. Hill*, 6 *Cal.* 17.) A party who appears at the taking of a deposition, and examines the witness, without objecting to his competency, cannot afterwards interpose that objection. *Brooks v. Crosby*, 22 *Cal.* 42.

7. When Admissible.—When the deposition of a witness is taken, objections to his competency must be taken at the time, and not reserved till the trial, or they will be deemed waived. (*Jones v. Love*, 9 *Cal.* 68.) A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial. (*Turner v. McIlhaney*, 8 *Cal.* 575.) The deposition of a surveyor who ran the boundary line of a grant, taken in one action, is admissible in another action, between different parties, as hearsay evidence upon the location of such lines, after his death. Hence, the deposition of Vioget, as to the position of the Southern boundary of the Sutter grant, offered in connection with the map drawn by him, is admissible as a hearsay evidence, though taken in another action between different parties. *Morton v. Folger*, 15 *Cal.* 275.

*No. 1069.**Affidavit for Examination of Witness.*

State of }
County of } ss.

A.B., being duly sworn, deposes and says:

I. I am the plaintiff in the above entitled action.

II. The summons in said action has been served; P. Q. is a witness material and necessary for me on the trial of said action, without the benefit of whose testimony I cannot safely proceed to trial; said witness resides in the County of, and is about to leave said County, where said action is pending and is to be tried, and will probably continue absent when his testimony is required.

III. I am informed and verily believe that it is the intention of said witness to depart from said County, on the day of, 18..; I was not aware of his intended departure in time to give five days' notice of the time and place of taking his deposition; and the attorneys for the said defendant reside at, in said County.

[SIGNATURE.]

[*Jurat.*]

*No. 1070.**Affidavit on Motion for Commission to Examine Witness out of State.*

[TITLE.]

State of }
 County of } ss.

A. B., the [plaintiff] in the above entitled action, being duly sworn, deposes and says:

That the summons in the said action has been served, and that P.Q. is a witness material and necessary for the said [plaintiff] on the trial of the said action, without the benefit of whose testimony the said [plaintiff] cannot safely proceed to trial; that said witness resides in the City of [New York, in the County of New York, in the State of New York], and is out of this State, and will continue absent when his testimony is required.

[SIGNATURE.]

[*Jurat.*]

8. By Whom Made.—This affidavit may be made by any person acquainted with the facts, if no stay of proceedings is desired. (*De Mar v. Van Zandt*, 2 *Johns. Cas.* 69.) But if otherwise, it will be better that the affidavit should be made by the applicant, or an excuse given for its not being so made. See *Eaton v. North*, 7 *Barb.* 631.

9. What it Must Show.—The affidavit must show that an issue of the fact has been joined. (*Allen v. Hendree*, 6 *Cow.* 400.) It is not necessary to state what facts are expected to be proved by the witness. (*Eaton v. North*, 7 *Barb.* 631.) As to the materiality of the witness, (*Id.*) And advice of counsel as to the same. (*Lansing v. Mickles*; *Beall v. Day*, 7 *Wend.* 513; *Eaton v. North*, 7 *Barb.* 631.) That witness is absent and will continue absent must be stated. (*Pooler v. Maples*, 1 *Wend.* 65.) As to requisites of affidavit under the New

York Practice, see *Seymour v. Strong*, 19 *Wend.* 98; *Eaton v. North*, 7 *Barb.* 631; *Franklin v. U.S. Ins. Co.*, 2 *Johns.* 27; *Meech v. Calkins*, 4 *Hill*, 534; *Warne v. Harvey*, 9 *Wend.* 444; *Bracket v. Dudley*, 1 *Cow.* 209.

No. 1071.

Notice of Taking Deposition of Witness, and Time and Place of Examination, with Copy of Affidavit.

[TITLE.]

You will please take notice, that the depositions of L.M. and N.O., on behalf of the plaintiffs in the above entitled action, to be used on the trial thereof, will be taken before P.Q., a notary public in and for the County of, in the State of California, at his office in the City of, County of, on the day of, A.D. 18 . . , between the hours of 9 A.M. and 5 P.M. of that day; and if not completed on that day, the taking thereof will be continued from day to day successively thereafter, and over Sundays, at the same place, until completed.

And you will further take notice that the annexed is a copy of an affidavit of S.T., one of the said plaintiffs, showing that the case is one mentioned in Section 428 of the Act to Regulate Proceedings in Civil Cases in the Courts of Justice of this State.

E. F.,

[DATE.]

Attorney for Plaintiffs.

10. Notice.—The party desiring to make a deposition must serve on the adverse party a previous notice of the time and place of examination, together with the copy of an affidavit showing that the case is one mentioned in Section 428. Such notice may be served on the Clerk of the Court at any time within the forty days immediately after

the service of summons by publication, and at any time after, when the defendant has not appeared. Such notice shall be, at least, five days, and in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice. (*Cal. Pr. Act*, § 429.) Notice of time and place having been given, it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule. (*Williams v. Chadbourne*, 6 *Cal.* 559.) A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice. *Mills v. Dunlap*, 3 *Cal.* 94.

11. Proof of Notice.—Proof of notice to take a deposition, where the written notice was defective, was held good when made by parol, and which conforms substantially to the Statute. *Mills v. Dunlap*, 3 *Cal.* 94.

12. Waiver of Objections.—An appearance at the time and place, and cross-examining the witness, waives whatever objection may be had because the notice is too short. *Jones v. Love*, 9 *Cal.* 68.

No. 1072.

Notice of Motion for Commission to Examine Witness out of State.

[TITLE.]

The defendant and his attorney will please take notice that upon the within affidavit, and upon the complaint and the papers filed in the above entitled action, I shall move this honorable Court, at the Court Room thereof, in the County of, on the day of, A.D. 18..., at the opening of the court on that day, or as soon thereafter as counsel can be heard, that a commission issue out of and under the seal of this honorable Court, to take the testimony of F.G., a witness residing out of this State, directed to

some proper person residing at the City of, in the State of, then and there to be selected and appointed by the Judge of this Court.

E. F.,

[DATE.]

Attorney for Plaintiff.

13. Motion to Take Deposition.—The decision of such motion rests in the sound discretion of the Court, who must decide upon the sufficiency or otherwise, of the grounds upon which such motion is made. (*Mills v. Dunlap*, 3 *Cal.* 94.) Proof of a notice to take a deposition, where the written notice was defective, was held good, when made by parol, and conforming substantially to the Statute. *Id.*

No. 1073.

Stipulation that Deposition of Witness may be Taken in this State to be Used on the Trial.

[TITLE.]

It is hereby stipulated that the deposition of R.S., a witness on behalf of the [plaintiff] in the above entitled action, may be taken before T.U., a notary public [*or any other officer or person agreed upon*] in and for the County of, in this State, at his office in said County, on the day of, 18.., between the hours of . . . A.M., and . . . P.M. of that day, and if not completed on that day, may be continued from day to day thereafter, and over Sundays, at the same place, until completed. And when so taken, the said deposition may be used on the trial of said action, subject to the same objections (except as to the form of interrogatories), as if the said witness were there personally present and testifying therein.

G. H.

[DATE.]

Attorney for the Defendant.

*No. 1074.**Order for Examination of Witness.*

State of ,
 County of]

Good cause being shown to me therefor, by the foregoing affidavit, it is ordered, that the deposition and testimony of the witness therein named be taken before L.M., a notary public in and for the County of , in the State of , at his office in the Town of , in said County of , on the day of , A.D. 18.., at o'clock in the forenoon of that day; and that a copy of said affidavit, and of this order, be served on the defendant or his attorneys three days previous to the last mentioned day.

N. O.,

Judge of the Judicial District.

[DATE.]

14. Order should State.—Order of Court to take testimony by deposition should specify the notice to be given to the adverse party. A deposition taken upon an order without such specification, where the opposite party has not had reasonable notice, ought not to be read in evidence. *Ellis v. Jaszyński*, 5 Cal. 444.

*No. 1075.**Order for Commission to Take Testimony.*

[TITLE.]

Upon reading and filling the affidavit of A.B., and upon the files, papers, and records in this action, and due proof of service of notice of motion having been

made and filed, on motion of G.H., Esq., attorney for the defendant in said action:

IT IS ORDERED, that a commission issue out of and under the seal of this Court, directed to J.K., a person agreed upon between the parties, residing at the City of, County of, in the State of, to take the testimony of P.Q., residing at the same place, as a witness on behalf of the defendant, upon such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties shall disagree as to their form, by the Hon. Judge of this Court, on the day of, 18.., at o'clock in the noon, at the court room of this Court.

I, W.L., Clerk of the District Court of the Judicial District of the State of, in and for the County of, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above entitled action, on the date mentioned in the caption thereof.

In witness whereof, I have hereunto set my hand and the seal of the said Court, this day of, 18...

W. L.,

Clerk.

By J. V.,

Deputy Clerk.

15. Commission, what to Contain.—In general, witnesses to be examined under a commission must be named in it. (*Wright v. Jessup*, 3 *Duer*, 642; *Forrest v. Forrest*, 3 *Bosw.* 661; 9 *Abb. Pr.* 289.) Where the names are not known to the party, if they are sufficiently described, and their evidence is shown to be material, the commission may be issued describing them. (*Shafer v. Wilcox*, 2 *Hall*, 502.) As

to the effect of a misnomer, compare (*Hayes v. Phelps*, 1 *Sandf.* 64; *Keeler v. Vanderpool*, 1 *Code R. (N.S.)* 289; *Brown v. Southworth*, 9 *Paige*, 351; *Blachett v. Lambeer*, 1 *Sandf. Ch.* 366.) The want of a seal is a fatal defect. *Ford v. Williams*, 24 *N.Y.* 359; *Tracy v. Suydam*, 30 *Barb.* 110; *Whitney v. Wyncoop*, 4 *Abb. Pr.* 370.

16. Cross-Interrogatories.—The adverse party may prepare cross-interrogatories, a copy of which should be served *two* days before the settlement. 1 *Burr. Pr.* 443.

17. Interrogatories, Settlements of.—The interrogatories must be settled by the Judge, and his allowance be indorsed upon the commission, under the New York practice. As to the practice therein, consult (2 *Rev. Stat. of N.Y.* 394.) As to the practice of settlement under the California practice, and that examination may be without interrogatories, consult (*Cal. Pr. Act*, § 434.) Documents to be identified by the witness, or copies of them, may be annexed to the interrogatories. (*Commercial Bank v. Union Bank*, 11 *N.Y.* 203.) And it is not essential that the *originals* should be thus attached. (*Id.*) Nor can either party be compelled to surrender an original document for this purpose. *Butler v. Lee*, 32 *Barb.* 75; *S.C.*, 19 *How. Pr.* 383.

18. Issuance of Commission.—If a commission to take the deposition of a witness out of the State is issued on the application of one party without consent of the other, to a person who is not a judge or justice of the peace or a commissioner appointed by the Governor of this State, and the party who does not consent, after the appointment, files cross-interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the commissioner was improperly appointed. (*Crowther v. Rowlandson*, 27 *Cal.* 383.) If the parties stipulate that a commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the commissioner, it is not necessary that the commissioner state in his certificate the day the same was taken. *Elgin v. Hill*, 27 *Cal.* 373.

19. Order should State.—The order should properly name the commissioners and the witnesses (see *Wright v. Jessup*, 3 *Duer*, 642). In New York, the order must be filed. (2 *Rev. Stat.* 394.) And if not filed, the commission itself is rendered irregular. *Whitney v. Wyncoop*, 4 *Abb. Pr.* 370.

20. Return.—It is not essential, though it is the better practice, that the return should state that the witnesses were publicly sworn. (Williams v. Eldridge, 1 *Hill*, 249; Halleran v. Field, 23 *Wend.* 38.) As to the directions for a return, see (Fleming v. Hollenback, 7 *Barb.* 271; Hall v. Barton, 25 *Barb.* 274.) That the direction of the officer who settles the interrogatories should be indorsed on the commission, see Hall v. Barton, 25 *Barb.* 274; Hurd v. Pendright, 2 *Hill*, 502; Crawford v. Lopes, 25 *Barb.* 449.

No. 1076.

Deposition.

[TITLE.]

Be it remembered: That pursuant to the stipulation hereunto annexed, and on the day of, 18.., at my office, in the County of, State of, before me, N.O., a Notary Public in and for the said County of, duly appointed and commissioned to administer oaths, etc. etc., personally appeared P.Q., a witness produced on behalf of the plaintiff in the above entitled action now pending in the said Court, who, being first by me duly sworn, was then and there examined and interrogated by E. F., of counsel for the said plaintiff, and by G. H., of counsel for the said defendant, and testified as follows: [*questions and answers.*]

21. Deposition as Evidence.—A deposition may be used at any stage of the action or proceeding. (*Cal. Pr. Act*, § 431.) The object of this section is to enable either party to read a deposition admissible in itself, once taken, in any stage of the action or proceeding—not to render it admissible simply because it was taken. (Turner v. McIlhaney, 8 *Cal.* 575.) A motion to suppress the reading of a deposition, before the case in which it was taken is put upon trial, is premature; the proper time to object to such deposition is when it is offered in evidence on the trial. (Mills v. Dunlap, 3 *Cal.* 94.) The

reading of evidence taken by deposition, although done after the jury have retired, is as much a part of the trial as any other. (*The People v. Kohler*, 5 *Cal.* 72.) But, *query*, whether a party can object, on second trial, to the reading of a deposition which he suffered his adversary to read on the first trial without objection. (*Myres v. Casey*, 14 *Cal.* 542.) The affidavits or other proof filed with the depositions, or certified copies thereof, shall be *prima facie* evidence of the facts. *Cal. Pr. Act*, § 441

22. Deposition Excluded.—A whole deposition cannot be excluded on the ground that certain questions asked on the examination were improper. The objection to the deposition on this ground must be confined to the particular questions, otherwise any error in permitting the questions will be waived. (*Higgins v. Wortell*, 18 *Cal.* 330.) It is no ground for the exclusion of a deposition, that it was noticed to be taken before the County Judge, but was taken before the County Clerk. *Williams v. Chadbourne*, 6 *Cal.* 559.

23. Exceptions.—Depositions are subject to all legal exceptions at the trial, save only the objection to the form of an interrogatory where the parties attend the examination. (*Lawrence v. Fulton*, 19 *Cal.* 683.) There is nothing in the Statute which requires that exception to deposition shall be filed before the time of trial. The objection can be made at any time before they are read in evidence. (*Dye v. Bailey*, 2 *Cal.* 384.) If part of the deposition be liable to the exception of hearsay, this goes only to the rejection of that part, and the objection should be taken at the hearing. *Myers v. Casey*, 14 *Cal.* 542.

24. Form of Deposition.—The deposition of each witness must be reduced to writing, under the direction of the commissioners; (*Keane v. Meade*, 3 *Pet.* 1; *McDonald v. Garrison*, 9 *Abb. Pr.* 34;) and be subscribed by the witness. (*Clarke v. Sawyer*, 3 *Sandf. Ch.* 351.) And must be certified by the commissioners; (*Cal. Pr. Act*, § 435;) who must make a return of the same in a sealed envelope, directed to the Clerk or other person designated or agreed upon, and forwarded to him by mail or other channel of conveyance. (*Id.*) As to form of deposition and certificate by commissioners under the Statute of New York, see 2 *Rev. Stat. of N.Y.* 394; see, also, *Clarke v. Sawyer*, 3 *Sandf. Ch.* 351; *McCleary v. Edwards*, 27 *Barb.* 239; *Hall v. Barton*,

25 *Id.* 274; *Randell v. Coon*, 20 *N.Y.* 134; *Fleming v. Hollenback*, 7 *Barb.* 271.

25. Notice of Exceptions.—Where a rule of a District Court requires three days' notice of exceptions to depositions unless the exceptions appear on the face of the deposition, the meaning is that the objection—not the objectionable matter—must appear on the face of the deposition. *Myers v. Casey*, 14 *Cal.* 542.

No. 1077.

Certificate of Notary.

State of California,
City and County of } ss.

I, N. P., a Notary Public in and for said County, do hereby certify that the witness P. Q., in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was taken at the time and place mentioned in the annexed stipulation, to wit: at my office in said County of, in the State of, and on the day of, 18.., between the hours of and of that day; that said deposition was reduced to writing by me, and when completed was by me carefully read to said witness; and being by him corrected, was by him subscribed in my presence.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office, this day of, 18...

G. H.,
Notary Public.

26. Attestation.—The certificate of the Notary is sufficient. (*Mills v. Dunlap*, 3 *Cal.* 94.) A certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the Statute. The admission of hearsay testimony to a fact admitted by both parties is not error. (*Williams v. Chadborne*, 6 *Cal.* 559.) The attestation or certificate of a notary, that an affidavit was sworn to or affirmed and subscribed before him, is regular although his seal is not affixed. (*Mills v. Dunlap*, 3 *Cal.* 97.) Where the affidavit of a juror is sworn to be correct by another party, it may be treated as the latter's original affidavit. (*Wilson v. Berryman*, 5 *Cal.* 44.) Courts take judicial notice of the official character of justices of the peace in their own States. And an affidavit in which the official character of the Justice before whom it is taken does not appear is good. *Ede v. Johnson*, 15 *Cal.* 53.

27. Certificate of Commissioner.—If, at the end of a deposition taken by a commissioner out of the State, there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of a compliance with the four hundred and thirtieth section of the Practice Act should be dated. *Elgin v. Hill*, 27 *Cal.* 373.

28. Foreign State.—When an affidavit is taken before a Judge of a court in another State, or in a foreign country, genuineness of the signature of the Judge, the existence of the Court, and the fact that such judge is a member thereof, shall be certified by the Clerk of the Court, under the seal thereof. *Cal. Pr. Act*, § 427.

29. Certificate of Mailing—Indorsed on the Envelope.
—Deposited in the post office, at, and the postage thereon paid by me, this day of, 18... [Signature of, Commissioner.]

CHAPTER XI.

TENDER.

1. In order to constitute a valid tender, the money or thing must be produced. The production of it must be proved with an *actual offer of it to the creditor*, unless it be shown that the latter dispensed with it by some positive act or declaration to that effect. Having the money in one's pocket or elsewhere, and offering to pay without producing the money, is not enough; there must be an actual offer and presentation, so that the creditor can either *take or refuse it* at his option. (15 *Wend.* 637; 6 *Id.* 22, note a, 35; *Strong v. Blake*, 46 *Barb.* 227.) And it must be unconditional; (*Roosevelt v. Bull's Head Bank*, 45 *Barb.* 579;) except such conditions as were by the terms of the contract conditions precedent to the performance thereof. (*Wheelock v. Tanner*, 39 *N.Y.* 481.) So, an offer to pay, provided the other party will give a receipt in full, is not a sufficient tender. (*Clark v. Mayor of N.Y.*, 1 *Keyes*, 9.) And the tender must be kept at all times ready for payment. (*Roosevelt v. Bull's Head Bank*, 45 *Barb.* 579; *Reddington v. Chase*, 34 *Cal.* 666.) See, as to tender generally, *Karker v. Haverly*, 50 *Barb.* 79; *Clark v. Mayer*, 1 *Keyes*, 9; see, also, Vol. ii., p. 746.

2. **California Practice.**—Under the Statute of California and decisions of our courts, see, generally, (*Cal. Pr. Act*, §§ 233, 506.) On sale and delivery, (*Id.*; *Lamott v. Butler*, 18 *Cal.* 32.) Money tender, (*Curiac v. Abadie*, 25 *Cal.* 502.) As to legal tender notes, see (*Vilhac*

v. Biven, 28 *Cal.* 409.) When necessary to maintain action, (*Folsom v. Bartlett*, 2 *Cal.* 163; *Vance v. Dingley*, 14 *Cal.* 53; *Crosby v. Watkins*, 12 *Cal.* 85.) When not necessary, see (*Goodale v. West*, 5 *Cal.* 339.) By whom made, (*Mahler v. Newbauer*, 32 *Cal.* 168.) See, generally, (34 *Cal.* 666; 34 *Id.* 616.) How made, see, *People ex rel. Thorne v. Hays*, 4 *Cal.* 127; *Gaven v. Hagen*, 15 *Id.* 208; *Reddington v. Chase*, 34 *Id.* 666.

3. Effect of Tender.—Tender (of money) bars an action to recover the debt, but it must be pleaded, and the amount thereof paid into court, and the notice thereof given in or with the plea. (1 *Gr. Pr.* 249, 541; 2 *Hill*, 538; 2 *Den.* 196; 23 *Wend.* 345; 8 *Barb.* 408; 2 *E. D. Smith*, 197; 3 *Chitt. Pl.* 955, 1,018; 21 *N.Y.* 354, 366; *Simpson v. French*, 25 *How. Pr.* 464.) So, in foreclosure of mortgage, a tender of the whole amount with costs, if refused, extinguishes the lien of the mortgage. (*Hartley v. Tatham*, 1 *Keyes*, 222.) In such case, when to be made see (*Perre v. Castro*, 14 *Cal.* 519; see, also, *Hawkins v. Hill*, 15 *Cal.* 49; *Mahler v. Newbauer*, 32 *Cal.* 168.) As to plea of tender, see Vol. ii., p. 746.

PART FOURTEENTH.

CERTIORARI, HABEAS CORPUS, QUO WARRANTO AND MANDAMUS.

CHAPTER I.

CERTIORARI.

1. The writ of *certiorari* may be denominated the writ of review. (*Cal. Pr. Act*, § 455.) When a new jurisdiction, unknown to the common law, is created by the Statute, a writ of error will not lie, but a *certiorari* will. (2 *Tidd*, 1,051; *Campbell v. Strong*, *Hempst.* 195.) So, in the absence of express prohibition, when a court acts in a summary manner, or in a new course different from the common law, *certiorari* will lie. (*Tierney v. Dodge*, 9 *Min.* 166.) It is issued from a superior court, directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case. (*Bac. Abr. h, t*; 4 *Vin. Abr.* 330; 3 *Penn.* 24; *Bouv.* 215; 27 *Ill* 140.) It is usually employed to review the proceedings of courts not of record, municipal corporations, special tribunals, commissioners and officers exercising judicial powers, which affect the citizen in his rights or property,

and acting in a summary way. *Puterbaugh's Pl. and Pr.* 543.

2. It is sometimes used as an auxiliary process, in order to obtain a full return to some other process, as in case of a diminution of record in an appeal it may be awarded to require a perfect transcript of all the papers. (1 *Scam.* 567; 2 *Id.* 55, 351; 3 *Johns.* 23; 1 *Blackf.* 32; 9 *Wheat.* 526; 11 *Mass.* 414; 2 *Munf.* 229; 2 *Cow.* 38; 7 *Halst.* 85; *Clark v. Hackett*, 1 *Blackf.* 77; *Barton v. Pettit*, 7 *Cranch*, 288; *Field v. Milton*, 3 *Cranch*, 514.) At common law, the writ of *certiorari* tries nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends. The review never extends to the merits; upon these the action of the inferior tribunal is final and conclusive, and our Statute is affirmatory of the common law. (*People ex rel. Church v. Hester*, 6 *Cal.* 679,) overruled in this respect, *People ex rel. Whiting v. Board of Delegates*, 14 *Cal.* 479.

JURISDICTION.

3. The Supreme Court of the State of California may exercise its appellate jurisdiction by means of the writ of *certiorari*. (*People v. Turner*, 1 *Cal.* 143.) But not where the review might have been had by an appeal. (*Milliken v. Huber*, 21 *Cal.* 165.) It may issue the writ to the District Court for the purpose of reviewing summary proceedings, where no appeal would lie. (*People v. Turner*, 1 *Cal.* 152.) Or to inferior courts, in every case within its reach, where such courts exceed their powers. (*Exp. Hanson*, 2 *Cal.* 263.) But its jurisdiction to review the proceedings of inferior courts,

boards, and officers, upon *certiorari*, is limited to cases where there has been an *excess of jurisdiction*; (People *v.* Johnson, 30 *Cal.* 98;) it being one of the principal objects of the writ to keep inferior courts and tribunals within their jurisdiction. (Combs *v.* Dunlap, 19 *Wis.* 591.) The amended Constitution confers upon the Supreme Court original jurisdiction in the issuance of this writ. Miller *v.* Board of Supervisors, 25 *Cal.* 95.

4. District judges have power to issue writs of *certiorari*, and to hear them on their return at chambers. (People *v.* Supervisors of Marin Co., 10 *Cal.* 346.) It is not necessary that a court have appellate jurisdiction; the writ may issue from a district court to a county judge. (Chard *v.* Harrison, 7 *Cal.* 113; People *v.* Board of Supervisors, 8 *Cal.* 58.) See, as to review of the action of a Board of Supervisors in the granting of a ferry license, (Murray *v.* Board of Supervisors, 23 *Cal.* 492; 4 *Hawk.* 144; 1 *Salk.* 146; 1 *Ld. Raym.* 580; Lawton *v.* Commrs. of Cambridge, 2 *Cal.* 179; Le Roy *v.* Mayor of N.Y., 20 *Johns.* 430; Lynde *v.* Noble, 20 *Id.* 80; Bradhurst *v.* First Great S. W. Turnpike Co., 16 *Id.* 8; *Exp.* Mayor of Albany, 23 *Wend.* 277.) But where the error complained of might have been corrected by appeal to the County Court, district courts cannot entertain jurisdiction by *certiorari*. Gray *v.* Schupp, 4 *Cal.* 185.

5. The paraphrase in the constitution, "all cases at law which involve the title or possession to real property," as given in (Holman *v.* Taylor, 31 *Cal.* 338), would be more correct if given in this language: "cases at law in which the title or *right* of possession of real property is a material fact in the case, upon which the

plaintiff relies for a recovery, or the defendant for a defense." It was not intended by the Constitution to withdraw from justices of the peace jurisdiction in actions of trespass, founded upon the possession of real estate, but only where the *right* to possession was an issuable fact in the case. *Pollock v. Cummings, Cal. Sup. Ct., Oct. T., 1869.*

WHEN IT WILL LIE.

6. Where error has occurred in proceedings, either civil or criminal, which cannot be reached by a writ of error, the writ of *certiorari* is a proper remedy to correct such error, unless some other statutory remedy has been given. (*The People v. Turner, 1 Cal. 152.*) So, in case of an order of the District Court fining and imprisoning for a contempt, without setting forth the facts. (*Id.; Ex parte Field, 1 Cal. 187.*) When the appellant claims that the statement is necessary, as the errors upon which he relies appear upon the face of the record, the Court errs in overruling the objection, as it was error within, and not an excess of jurisdiction, for which relief can be had by *certiorari*. (*People v. Barney, 29 Cal. 459.*) So, where a writ of *mandamus* was issued by the County Clerk, commanding the Clerk to issue a writ of restitution upon *remittitur* filed in the District Court. (*Clary v. Hoagland, 5 Cal. 476.*) So, where a county court exercises the power in a judicial capacity which properly belongs to the Board of Supervisors in a non-judicial capacity, as the granting of a ferry license. (*Chard v. Harrison, 7 Cal. 113.*) So, where a board exercises a judicial power as rendering a decision in a contested election case, whether the board has exceeded its jurisdiction is properly subject to re-

view on *certiorari*. *Whitney v. Board of Delegates*, 14 *Cal.* 479.

7. As to how far and when the proceeding of such boards are judicial, and hence reviewable on *certiorari*, and how far and when legislative, and hence not so to be reviewed, discussed, (*Robinson v. Board of Supervisors of Sacramento*, 16 *Cal.* 208.) A writ of *certiorari* will lie in the District Court, to review the action of the Board of Supervisors. (*People v. Supervisors*, 8 *Cal.* 59.) For the review of these acts, when partaking of a judicial character, (*Hastings v. City and County of San Francisco*, 18 *Cal.* 49.) So, where the Board of Supervisors reject an official bond for any other reason than that it is not in form and substance in compliance with the requirements of the Statute, or is not executed by sufficient and responsible sureties. (*Miller v. Board of Supervisors*, 25 *Cal.* 94.) Where plaintiff seeks to enjoin a sale of personal property, under an execution issued upon a judgment recovered against him in a justice's court, if the time for appeal has elapsed, he can apply to the County Court for a writ of *certiorari*, and thus review the action of the Justice in rendering the judgment so far as the question of jurisdiction is concerned. *Comstock v. Clemens*, 19 *Cal.* 78.

8. It will lie to review the order of the Circuit Court. (*Jerome v. Williams*, 13 *Mich.* 521.) Applications to this Court for writs of *certiorari* to justices of the peace will not be entertained unless satisfactory reasons are shown for not obtaining the same from a circuit court or judge. (*Hurlbut v. Wilcox*, 19 *Wis.* 419.) A judgment in justice's court, void for want of jurisdiction, will be reversed on *certiorari*. (*Combs v. Dunlap*, 19 .

Wis. 591.) It will lie to review the action of the Circuit Court in certain proceedings not subject to appeal. (*Faribault v. Hulett*, 10 *Minn.* 30.) It lies from the Probate Court to a justice's court. (*Paul v. Armstrong*, 1 *Nev.* 82.) The Circuit Court of the District of Columbia has jurisdiction to issue a *certiorari* to a justice of the peace in a case of forcible entry and detainer. *Holmead v. Smith*, 5 *Cranch. C. Ct.* 343; *United States v. Browning*, 1 *Id.* 590; *United States v. Donahoe*, *Id.* 474.

WHEN THE WRIT WILL NOT LIE.

9. A writ of *certiorari* is not the proper remedy where there has been no excess of jurisdiction. (*Cutter v. Stark*, 7 *Cal.* 244.) Or merely from defect of jurisdiction. (*Fowler v. Lindsey*, 3 *Dall.* 411; to the contrary, *Kennedy v. Gorman*, 4 *Cranch. C. Ct.* 347.) Where the superior court has not exclusive or original jurisdiction, a *certiorari* cannot be maintained. (*Fowler v. Lindsey*, 3 *Dall.* 411.) It does not lie to an inferior tribunal, except to remove proceedings which remain before it. (*People v. Highway Commissioners*, 30 *N.Y.* 72.) Or where there is an adequate remedy by appeal. (*Clary v. Hoagland*, 13 *Cal.* 173; *People v. Shephard*, 28 *Cal.* 115.) Or by any other adequate remedy. *People ex rel. Onderdonk v. Supervisors of Queens*, 1 *Hill*, 195; see 2 *Id.* 12; *People v. Overseers of Poor of Town of Berne*, 44 *Barb.* 467.

10. A *certiorari* to the Board of Supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the Board. (*Wilson v. Supervisors*, 3 *Cal.* 386.) As a *certiorari* is not allowed before the

case is finally adjudicated below. (*Lynde v. Noble*, 20 *Johns.* 80; *Husted's Case*, 17 *Abb. Pr.* 326.) So, in case of forcible entry and detainer, it is premature until there is nothing to remove. (*Haines v. Backus*, 4 *Wend.* 213.) So, in proceedings before the Board of Supervisors. (20 *Johns.* 80; 3 *Abb. Pr.* 194; 26 *Barb.* 637; *People v. Livingston County*, 43 *Barb.* 232.) As to limitation of time in which to apply for writ of *certiorari* in cases of the review of assessments, see (*People ex rel. Metropolitan Bank v. Commissioners of Taxes*, 43 *Barb.* 494.) It ought not to issue after a limit of a writ of error. (*Elmendorf v. Mayor of N.Y.*, 25 *Wend.* 693; *People v. Mayor of N.Y.*, 2 *Abb. Pr.* 9.) It will not lie after five years. *Vaughn v. Marshall*, 1 *Houston (Del.)* 348.

11. *Certiorari* will not lie in case of property taken for public use without compensation. (*People ex rel. Cook v. Neaving*, 27 *N.Y.* 306.) Nor in case of a resolution of a board of supervisors to raise money upon the credit of the County. (*People ex rel. Dickenson v. Supervisors*, 43 *Barb.* 232.) Nor to review proceedings of tax commissioners after the assessment rolls have been delivered. (*People v. Commissioners of Taxes*, 43 *Barb.* 494.) Nor, *it seems*, where the object of a writ of *habeas corpus* is to inquire whether there is probable cause for commitment. (*Walton v. Gatlin*, 1 *Wins. (N.C.)* No. 1, 318.) Nor to bring proceedings in insolvency cases before the Supreme Court. (*People v. Shepard*, 28 *Cal.* 115.) Nor to bring up for review an erroneous decision of the County Court in overruling a demurrer. (*People v. Barney*, 29 *Cal.* 459.) Nor to review the action of the District Court in punishing, as for contempt. (*People v. Dwinelle*, 29

Cal. 632.) It will not lie to bring up proceedings of a justice against tenants holding over. *Lenox v. Arguelles*, 4 *Cranch C. Ct.* 477.

WHAT SUBJECT TO REVIEW.

12. The jurisdiction of the Supreme Court, on appeal from a judgment of the District Court rendered in a *certiorari* case, does not depend upon the amount in controversy. The only question the Supreme Court looks into is to ascertain whether the inferior tribunal, board or officer, had jurisdiction, and if not, whether there is any appeal or other plain, speedy and adequate remedy. (*Winter v. Fitzpatrick*, 35 *Cal.* 269.) The Supreme Court, on *certiorari*, will only inquire whether the inferior court exceeded its jurisdiction. (*People v. Dwinelle*, 29 *Cal.* 632; *People ex rel. Porter v. City of Rochester*, 21 *Barb.* 656; *People v. Overseers*, 6 *How. Pr.* 25; *Stone v. Mayor of N.Y.*, 25 *Wend.* 157.) It cannot review mere errors of law of the County Court, in cases where it has jurisdiction, even though there is no appeal. (*People v. Burney*, 29 *Cal.* 459.) It cannot review questions of fact. (*Allen v. Commissioners*, 19 *Wend.* 342.) Though the review by the courts extends to every issue of law and fact involved in the question of jurisdiction. (*Whitney v. Board of Delegates*, 14 *Cal.* 479.) But it never extends to the merits. (*Id.*; *People v. Mayor of N.Y.*, 2 *Hill*, 9; *Haviland v. White*, 7 *How. Pr.* 154; *contra*, *Carter v. Newbold*, 7 *Id.* 166.

13. *Certiorari* tries nothing but the jurisdiction, and, incidentally, the regularity of the proceedings upon which the jurisdiction depends. (*Whiting v. Board of Delegates*, 14 *Cal.* 500.) The decision of the

inferior court, establishing the existence of a fact essential to the exercise of its jurisdiction, is subject to review on *certiorari*. (Lowe v. Alexander, 15 Cal. 300.) Except in cases of fraud, an order allowing a claim against a county by a board of supervisors must be reviewed by *certiorari*. (El Dorado Co. v. Elstner, 18 Cal. 144.) The decision of the board of delegates, in the case of a contested election for chief engineer, is a judicial decision, and subject to review by the courts on *certiorari*. The extent of such review is simply to inquire whether the board has exceeded its jurisdiction. Whitney v. Board of Delegates, 14 Cal. 479.

14. A *certiorari* cannot be sued by a purchaser of property who was not a party to the proceedings for seizure, as his rights are not affected thereby. (People v. Berne, 44 Barb. (N.Y.) 467.) The test as to the right of review is whether the person seeking to review was a party to the proceeding sought to be reviewed. (Starkweather v. Seeley, 45 Barb. 164.) And where a party has no interest in the proceedings, he cannot prosecute a *certiorari*. Colden v. Borts, 12 Wend. 234.

15. **Affidavit.**—In Georgia, it was held that it is not necessary to verify by affidavit the statement of facts in the petition for *certiorari*, in order to obtain the writ. (Ware v. Craven, 30 Ga. 37.) But see decisions of our courts. To justify the issuing of a writ of *certiorari* from the District Court, to review proceedings in an action which has passed to judgment in a county court, on the ground that the latter court had no jurisdiction by reason of the excess of the amount in controversy, the affidavits by the applicant must state the amount of the judgment rendered. The question of jurisdiction depends upon the amount of the judgment, and not the amount prayed for in the complaint. (Wratten v. Wilson, 22 Cal. 465.) Opposing affidavits may be received. (People ex rel. Onderdonk v. Supervisors, 1 Hill, 195; People

v. First Judge of Columbia, 2 *Id.* 398; *Saratoga and Wash. R.R. Co. v. McCoy*, 5 *How. Pr.* 375.) The affidavit must state that the application is made in good faith, and not for the purpose of delay. *Cunningham v. La Crosse Packet Co.*, 10 *Minn.* 299.

16. Bond.—When a writ of *certiorari* is issued out in an action for forcible entry and detainer, a bond must be given, and the want of it is not excused by the poverty of the plaintiff. (*Holmes v. Holloway*, 21 *Texas*, 658.) The bond is discharged if the judgment of the Justice is set aside for irregularity. *Swanson v. Ball*, *Hempst.* 39.

17. Discretion.—The granting of a *certiorari* is in the discretion of the Court. (2 *Hill*, 398; 5 *How. Pr.* 378; *People ex rel. Church v. Supervisors*, 15 *Wend.* 198; *People v. Mayor of N.Y.*, 2 *Hill*, 9; *Matter of Mt. Morris Square*, *Id.* 14; *People v. Mayor of N.Y.*, 5 *Barb.* 43; *People v. City of Rochester*, 21 *Id.* 656; *People v. Stilwell*, 19 *N.Y.* 531; *People ex rel. Onderdonk v. Supervisors*, 1 *Hill*, 195.) To determine the validity of a tax. (15 *Wend.* 198; *Susquehanna Bk. v. Supervisors*, 25 *N.Y.* 312; *People v. Supervisors*, 43 *Barb.* 232.) To review proceedings of local public authorities. *Matter of Eightieth Street*, 17 *Abb. Pr.* 324.

18. Issuance of Writ.—Several writs of *certiorari* may be issued in one case. *Matter of Woodbine Street*, 17 *Abb. Pr.* 112.

19. Notice.—There is no provision of the Statute requiring notice on the adverse party, on application for a procurement of a writ of *certiorari* to bring up the record and proceedings in the action. (*Pollock v. Cummings*, *Cal. Sup. Ct., Oct. T.*, 1869.) It is obvious, however, that he should be duly notified of the proceedings. *Pollock v. Cummings*, *Cal. Sup. Ct., Oct. T.*, 1869.

20. Particular Cases.—Where officers make a void order which is *coram non judice*, it is properly to be canceled by *certiorari*. (6 *Wend.* 563; *People v. Judges*, 24 *Wend.* 249; *Wildy v. Washburn*, 16 *Johns.* 49; *Fitch v. Commissioners*, 22 *Wend.* 132.) If the decision of commissioners in highway cases is appealed from, *certiorari* lies to remove the proceedings into the Supreme Court. (*Lawton v. Commissioners*, 2 *Cai.* 179; *Commr's of Kinderhook v. Claw*, 15 *Johns.* 537; *Pearshall v. Commissioners*, 17 *Wend.* 15; *Pugsley v. Anderson*, 3 *Id.* 468.) But it does not lie to review acts of commissioners in laying out a road. (*People ex rel. Woodward v. Covert*, 1 *Hill*, 674.) In what

cases it lies in highway cases, see (*Baldwin v. City of Buffalo*, 25 *N.Y.* 375.) The order granting a *habeas corpus* may be reviewed on *certiorari*. (*People v. Mayer*, 16 *Barb.* 362; *Spencer v. Hilton*, 10 *Wend.* 608.) In cases of municipal assessments for improvements, *certiorari* will lie. (*Le Roy v. Mayor of N.Y.*, 20 *Johns.* 430; *Starr v. Trustees of Rochester*, 6 *Wend.* 564; *People v. City of Rochester*, 21 *Barb.* 656; *Elmendorf v. Mayor of N.Y.*, 25 *Wend.* 593; *Betts v. City of Williamsburgh*, 15 *Barb.* 255.) But not at the instance of an individual, for the laying of a tax or assessment which affects a considerable number of persons. (2 *Hill*, 16; *Case of Fifty-First Street*, 3 *Abb. Pr.* 232.) In case of a special statute, see (6 *Wend.* 564; 20 *Johns.* 430; 8 *Pick.* 218; 2 *Hill*, 14; 5 *Barb.* 43; *Exp. Van Orden*, 13 *Blatchf.* 166; *People v. Mayor of Brooklyn*, 9 *Barb.* 535.) In cases of ministerial officers, see (*Matter of Bruni*, 1 *Barb.* 187.) Of officer whose term has expired, to bring up his official proceedings for review, see (*Bac. Abr. Cert. F.*; 13 *Pick.* 477; 1 *Salk.* 322; 4 *East.* 604; 6 *How. Pr.* 175; *People ex rel. Devlin v. Peabody*, 6 *Abb. Pr.* 228.) As to turnpike assessors, (*Broadhurst v. First Great Turnpike Co.*, 16 *Johns.* 8.) Or railroad appraisers. *Hill v. Mohawk and Huds. R.R. Co.*, 7 *N.Y.* 152.

21. Petition for Writ.—A petition for *certiorari* must state the amount of the judgment, what it was for, that it was rendered, and against whom. (*Boyd v. Clark*, 21 *Texas*, 426.) A petition for *certiorari* will be dismissed, which does not allege that the facts therein stated were proved, or does not give any reason why they were not proved. (*Baldwin v. Hardin*, 21 *Texas*, 443.) Heirs may petition for a *certiorari*, to revise the order of a county court, under which the homestead of the deceased was not legally disposed of. (*Norris v. Duncan*, 21 *Id.* 594.) When the petitioner for a *certiorari* was detained at home by violent sickness during the trial of his cause, and after judgment his counsel obtained an appeal upon condition of his giving security for the appeal, which he failed to do by reason of his detention at home, it was *held*, that these facts were sufficient to rebut the idea of his having abandoned the right to appeal, and entitled him to a *certiorari*. *Sharpe v. McElwee*, 8 *Jones L. (N.C.)* 115.

22. Principles of Determination.—The necessary evidence to make out a fact essential to the jurisdiction of the officer will be assumed. (*People v. Soper*, 7 *N.Y.* 428.) As to testimony, see (*Overseers of Plattekill v. Overseers of New Paltz*, 15 *Johns.* 305.)

As to error in summoning jurors, (*Farrington v. Morgan*, 20 *Wend.* 207.) In proceedings in highways, (*People ex rel. Robinson v. Ferris*, 36 *N.Y.* 218.) As to assessors in making their return to a *certiorari*, sued out to renew a tax, *State line R.R. Co. v. Fredericks*, 48 *Barb.* 173.

23. Proceedings.—A defendant in a criminal case cannot take out a writ of *certiorari*, except by special allowance of the Supreme Court or a judge thereof, or by consent of the Attorney-General, but such writ may be sued out by the District Attorney in behalf of the Commonwealth, without such allowance or consent. (*Commonwealth v. Capp*, 48 *Penn. State*, 53.) A person not a party to summary proceedings cannot sue out a *certiorari*. (*Starkweather v. Seeley*, 45 *Barb.* 164.) The proceeding of the taxpayer in the District Court, contemplated by this statute, is a proceeding by *certiorari*, in the form and according to the course of that kind of suit, and the issuance of that writ is necessary to stay proceedings beyond the ten days, though probably no formal order of injunction is necessary. *C.N. Railroad Co. v. Butte Co.*, 18 *Cal.* 671.

24. Return of Writ.—On petition for a *certiorari*, court must wait for a return in form from the court below. (*Ex parte Dugan*, 2 *Wallace (U.S.)* 134.) In order to procure a reversal, it is necessary that the order should be brought up and made a part of the record. (*People v. Highway Commissioners*, 30 *N.Y.* 72.) A common law *certiorari* brings up so much of the evidence as is necessary to present the questions of law upon which the relator relies to avoid the determination of the inferior court. (*Baldwin v. City of Buffalo*, 35 *N.Y.* 375.) When a case is brought from an inferior Court or tribunal to the Supreme Court by *certiorari*, if all the facts upon which the court below acted are not in the record, the Supreme Court may require the court below to certify such facts. *Blair v. Hamilton*, 32 *Cal.* 49.

25. Return.—The return is made, by annexing to the petition a certificate that it is a full, true, and correct copy of the pleadings and proceedings in the action. If that document constitutes the return, then there is no petition, unless the same document is both petition and return. (*Pollock v. Cummings*, *Cal. Sup. Ct., Oct. T.*, 1869.) The return of a finding of facts made by a County Judge to writ of *certiorari* constitutes a part of the record, though the finding is not made until the next term after the testimony is taken, and the order or judgment based on it is made. (*Blair v. Hamilton*, 32 *Cal.* 49; see *P. R.R. Co.*

v. Placer Co., 32 *Cal.* 582.) A jury are no longer a legal body after their verdict is signed and they have reported; hence a return to a writ of *certiorari*, signed by one of them afterwards, is no return of the jury to a body or a tribunal. (*People v. Highway Commissioners*, 30 *N.Y.* 72.) For sufficiency of return in a case of garnishment, see (*Gould v. Myer*, 36 *Ala.* 565.) In summary proceedings, (*Benjamin v. Benjamin*, 5 *N.Y.* 383.) By officer, after term expired, 13 *Pick.* 477; 1 *Salk.* 322; 4 *East*, 604; 12 *Johns.* 31; 1 *Cow.* 168; *Harris v. Whitney*, 6 *How. Pr.* 175.

26. What Questions may be Raised.—The office of a writ of *certiorari*, when issued out of the Supreme Court, to review the proceedings and determinations of the inferior tribunals, extends unquestionably to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings—that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the Statute law, or by well settled principles of the common law. 20 *Johns.* 80; 6 *Wend.* 566; 10 *Id.* 421; 15 *Id.* 452; 8 *Cow.* 13, 16; 7 *Id.* 108, 136, 137; 17 *Wend.* 464; 20 *Id.* 103; 2 *Hill*, 9, 11, 398; 6 *How. Pr.* 25; 6 *Cow.* 570; 2 *Wend.* 395; 5 *Id.* 98; 32 *Barb.* 131; 43 *Id.* 232; 3 *Seld.* 152; 3 *Kern.* 223; 23 *N.Y.* 192, 222; 26 *Id.* 163; *People ex rel. Citizens' Gas Light Co. v. Board of Assessors*, 39 *N.Y.* 81; *People ex rel. Buffalo and State Line R.R. Co. v. Fredericks*, 48 *Barb.* 173; see, also, *People ex rel. Cook v. Board of Police*, 39 *N.Y.* 506.

27. What Questions may be Raised.—It may determine whether there is any evidence, but not upon the weight and just force of evidence. (*People v. Overseers of Ontario*, 15 *Barb.* 286.) Or whether the fact of jurisdiction is established. (*People ex rel. Bodine v. Goodwin*, 5 *N.Y.* 568.) They have a right to inquire into the principles upon which judges assessed damages, in case of an assessment. (*Stone v. Mayor of N.Y.*, 25 *Wend.* 157; *Baldwin v. Calkins*, 10 *Wend.* 166; but see *Mattter of Mount Morris Square*, 2 *Hill*, 14.) See, further, on assessments, (*Bouton v. President of Brooklyn*, 2 *Wend.* 395; *Exp. Mayor of Albany*, 23 *Id.* 277; *Owners of Ground v. Mayor of Albany*, 15 *Id.* 374; *People v. City of Rochester*, 21 *Barb.* 656.) As to taxation, see (2 *Stra.* 932; 2 *T.R.* 234; 2 *Cai.* 182; *Church v. Supervisors*, 15 *Wend.* 198.) In summary proceedings, *Niblo v. Post*, 55 *Wend.* 280; following *Anderson v. Prindle*, 23 *Id.* 616; *Buck v. Binninger*, 3 *Barb.* 391.

CHAPTER II.

HABEAS CORPUS.

1. The writ of *habeas corpus* is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained. (*Hurd on Habeas Corpus*, 143.) The writ of *habeas corpus*, when issued to inquire into the cause of an imprisonment, is in the nature of a writ of error, and when allowed and heard by an officer out of court, the officer is deemed a court, within the meaning of the Act which forbids certain persons to be discharged before the expiration of the sentence, except upon a review by a court of superior jurisdiction to the magistrate making the commitment. (3 *Bl. Comm.* 131-2; 2 *Burr.* 755-6; *Ingersoll on Hab. Corp.* 36; 4 *Johns.* 360; *Bac. Abr. Hab. Corp. A*; 3 *Pet.* 203; Case of the Twelve Commitments, 19 *Abb. Pr.* 394; Matter of Miller, 1 *Daly*, 512.

THE RIGHT OF PERSONAL LIBERTY.

2. Personal liberty is defined to be the power of unrestrained locomotion. (*Hurd on Habeas Corpus*, 1.) It is the right to do all things which a person wants to do, when the doing of those things will not violate any principle of common justice. It is the right to pursue happiness in any way man may choose, so that he does not give others misery. It is the unrestrained power to do *right*, with all *reasonable restraints* against doing

wrong. *Personal liberty* does not mean license to commit crimes, or to go forth and be the judge in one's own case, and impose the penalty and inflict the punishment of real or fancied wrongs, without restraint. In ordinary terms, it means that we, as members of society, owing duties to it, and receiving benefits from it, will do unto others as we would they would do unto us.

3. Governments are formed for the purpose of securing and protecting men in the enjoyment of their natural rights, and they would fail of accomplishing that object if the powers to regulate or prescribe the mode in which such rights are to be exercised be not lodged in the law-making department. (*Ex parte Nellie Smith, Cal. Sup. Ct., Oct. T., 1869.*) Hence, this provision of the Constitution is not to be understood as putting life or liberty entirely beyond the reach of the Government, if, for misconduct, the general welfare of the community demands its sacrifice, or restraint; or as allowing every one to acquire property after his own unregarded manner, and according to his own uncontrolled will, but in such a manner and by such means as the general welfare of the community may require him to observe. While the exercise of these rights cannot be denied to any one, it may be regulated. *Ex parte Nellie Smith, Cal. Sup. Ct., Oct. T., 1869.*

4. As the Legislature is not prohibited from *all* interference with the rights enumerated in the Constitution (*Ex parte Nellie Smith, Cal. Sup. Ct., Oct. T., 1869*), such reasonable restraints as tend to keep man's passions in due bounds are not infringements

upon his right of personal liberty. If it were so, then personal liberty would mean barbarism; these restraints are prescribed by the supreme power in the State, and a cheerful obedience to them is one of the chief evidences of an enlarged security for life, liberty, and property. Every act which may tend to impair the exercise of the natural right of persons, beyond what is needful for the general good, may be prohibited.

5. But the instances are many, even in the history of our own country, when a citizen has been restrained of his personal liberty without due process of law, and this too when he has committed no wrong, or if he has, when he is being punished in an illegal manner. Hence the wisdom of our ancestors provided a means by which a person so restrained of his liberty contrary to law might in a speedy manner be freed. This means is the writ of *habeas corpus*, the privilege of which writ shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it. *Const. of U.S.*, Art. i., § 9, Subd. 2; *Const. of Cal.*, Art. i., § 5.

RIGHT OF BAIL.

6. In nearly every State in the Union, all offenses are bailable, except only such felonies as are punished by death, and in those cases "the proof must be evident, or the presumption great," to deprive the party of the right of bail. (*Hurd on Habeas Corpus*, 434.) In some States the right to bail, where the proof is not thus evident, in capital cases, is not guaranteed by the constitutions thereof, but even then the right is as fully secured by the decisions of their courts. See *Ex parte Taylor*, 5 Cow. 39; *Jones v. Kelly*, 17 Mass. 116; *Evans v.*

Foster, 1 *N.H.* 374; 1 *Hill*, 398; *Hurd on Habeas Corpus*, 437.

7. The varied and sometimes difficult questions presented to the courts, when application for bail is made by a party charged with the commission of a felony, become matters of judicial discretion. No two cases are alike, and the Judge necessarily stands between the liberty of the petitioner and the offended law. In capital cases, the fact as to whether the *proof is evident or the presumption great*, may often cause a judge to doubt between two opinions. The *discretion* above referred to means a *conscientious*, a *legal discretion*. Under the benign influence of a modern civilization, the punishment imposed for the commission of the most heinous crimes is inflicted not so much to cause the subject pain as to avoid its repetition, to warn others against the committing of a like offense. Hence *vindictive* punishments and *long imprisonments*, except in rare and extreme cases, are unknown in American jurisprudence.

No. 1078.

Petition for Writ.

In the Matter of the Appli-
cation of, for a
Writ of *Habeas Corpus*. }

To the Hon., Judge of the District Court of
the Judicial District of the State of,
in and for the County of:

The petition of respectfully shows:

That is unlawfully imprisoned, detained,
confined, and restrained of his liberty, by, at
., in the County of, in the
State of

That the said imprisonment, detention, confinement,
and restraint are illegal; and that the illegality thereof
consists in this, to wit: [*state what.*]

Wherefore your petitioner prays that a writ of *habeas
corpus* may be granted, directed to the said,
commanding him to have the body of before
your Honor at a time and place therein to be specified,
to do and receive what shall then and there be consid-
ered by your Honor concerning him, together with
the time and cause of detention, and said writ;
and that he may be restored to his liberty.

Dated on the day of, 18

[*Ordinary Jurat.*]

8. **Affidavit.**—It is not necessary that the affidavit upon which the requisition issued should set forth the crime charged with all the legal exactness necessary to be observed in an indictment. If it distinctly charge the commission of an offense, it is all that is necessary. (*Matter of Manchester*, 5 *Cal.* 23.) So, it is not necessary that the affidavit should state that the prisoner is a "fugitive from justice." (*Id.*) The affidavit of a colored person was admitted on *habeas corpus*, though by the law of the State he was not competent as a witness. *Norris v. Newton*, 5 *McLean*, 92; and see *Nan v. Moxley*, 1 *Cranch C. Cl.* 523.

9. **Repeated Applications.**—The doctrine of *res adjudicata* does not apply to proceedings on *habeas corpus*, and the refusal to grant the writ is no bar to a second application. (*In Re Edward Ring*, 28 *Cal.* 247; *In Re Perkins*, 2 *Cal.* 424.) See, under common law rule, 13 *Mee. & W.* 679; 5 *Id.* 32; 1 *East*, 306, 314; 14 *Id.* 91; 9 *Adol. & E.* 731; *Exp. Kaine*, 3 *Blatchf.* 1; compare 14 *How. U.S.* 103; *Exp. Robinson*, 6 *McLean*, 355.

No. 1079.

Order Granting Writ.

[TITLE.]

On reading and filing the petition of, duly signed and verified by him, whereby it appears that he is illegally imprisoned and restrained of his liberty by, at the, in the County of, in the State of, and stating wherein the illegality consists, from which it appears to me that a writ of *habeas corpus* ought to issue:

IT IS ORDERED, that a writ of *habeas corpus* issue out of and under the seal of the District Court of the Judicial District of the State of, in and for the County of, directed to the said, commanding him to have the body of the said before me, in the court room of the said Court, on the day of, 18.., at

.... o'clock A.M. of that day, to do and receive what shall then and there be considered concerning the said, together with the time and cause of his detention, and that he have then and there the said writ.

Dated on the day of, 18...

P. Q.,

District Judge, District.

10. Discharge.—When a party is “in confinement for acts done in pursuance of a law of the United States, and under process from a judge of the same,” he will be discharged on *habeas corpus*. (*Exp. Jenkins*, 2 *Wall. jr. C. Ct.* 521; 2 *Am. Law Reg.* 144.) So, when the indictment charges an offense not known to the law. (*In Re Corryell*, 22 *Cal.* 178.) So, where five females are brought before the Court on a return to a writ of *habeas corpus*, and the person in whose custody they are neither shows nor claims any legal right to detain them, they will be discharged. (*Exp. “Queen of the Bay,”* 1 *Cal.* 157.) A prisoner committed on final process will not be discharged on *habeas corpus* by reason of defects in the judgment, unless the judgment is *absolutely void*. (*People v. Smith*, 1 *Cal.* 9.) If the warrant of commitment be informal or insufficient, the Court, upon *habeas corpus*, will discharge the prisoner; but if sufficient cause appear, will recommit him in proper form. (*Exp. Bennet*, 2 *Cranch C. Ct.* 612; see, also, *Exp. Branigan*, 19 *Cal.* 133; *Exp. Milburn*, 9 *Pet.* 704.) Where the prisoner is not discharged on a writ of *habeas corpus*, it is the duty of the Court to remand him. *People ex rel. Crouse v. Cowles*, 4 *Keyes*, 38.

11. Hearing on Habeas Corpus.—If at the hearing on *habeas corpus* the warden of the prison has not a certified copy of the judgment in his hands, and it appears that a judgment authorizing the imprisonment was entered, a copy of which can be procured, a reasonable time will be given to procure such copy, and if obtained the writ will be quashed. (*In Re Edward Ring*, 28 *Cal.* 247; *Exp. Gibson*, 31 *Cal.* 619.) An inquiry may be made outside the record, to ascertain whether in fact the confinement is on account of acts done in pursuance of a law of the United States, and under process from a judge of the same. (*Exp. Jenkins*, 1 *Phil.* 168; 2 *Wall. jr. C. Ct.* 521; 2 *Am. Law Reg.* 144.) The functions of the writ, where the party appealing

to its aid is in custody under process, does not extend beyond an inquiry into the jurisdiction of the Court by which it was issued, and the validity of the process upon its face. *Ex parte McCullough*, 35 Cal. 97.

12. Hearing.—The Court may proceed to inquire whether the indictment charges any offense known to the law. (*In Re Corryell*, 22 Cal. 178.) But it is not competent to re-try the issues of fact, or to review the proceedings of a legal trial. (*Ex parte Bird*, 19 Cal. 130.) Under the writ of *habeas corpus* it is not competent to determine whether or not the order of the Court upon which the process was founded is or is not erroneous. (*Ex parte McCullough* 35 Cal. 97.) The remedy in such case is by *certiorari*. (Matter of Place, 34 How. Pr. 259.) The Court has only to inquire whether a warrant of commitment states a sufficient probable cause to believe that the person charged has committed the offense. (*United States v. Johns*, 4 Dall. 412.) *Habeas corpus* is the proper remedy for every unlawful imprisonment, both in civil and criminal cases; but an imprisonment is not unlawful, in the sense of this rule, merely because the process or order under which the party is held has been irregularly issued, or is erroneous. *Ex parte McCullough*, 35 Cal. 97.

13. Jurisdiction—State Courts.—By the Act of April 20th, 1852, the power of hearing and determining writs of *habeas corpus* is vested in the judge of every court of record in the State. (Matter of Perkins, 2 Cal. 424; *People v. Gaul*, 44 Barb. 98; Matter of Barrett, 42 Barb. 479.) In term or in vacation. (*State v. Hill*, 10 Minn. 63.) So, in case of a party arrested as a fugitive from justice. (Matter of Manchester, 5 Cal. 237.) But they have no power to control the executive discretion in such cases. Yet that discretion may be inquired into in every case involving the liberty of the citizen. (*Id.*) Its allowance in term time by the Supreme Court of California is in the discretion of the Court. (*Exp. Ellis*, 11 Cal. 222.) The Supreme Court may exercise its appellate jurisdiction by means of this writ. (*People v. Turner*, 1 Cal. 143.) But by the amendment to the Constitution, it has original jurisdiction in the issuance of the writ. (*Tyler v. Houghton*, 25 Cal. 26.) As to the jurisdiction of state courts in the issuance of this writ, consult ("*Jurisdiction*," Vol. i., p. 20, n. 24.) Of the Supreme Court, (*Id.* p. 24, n. 35.) Its original jurisdiction, (p. 27, n. 45.) Of the district courts, (*Id.* p. 29, n. 53, p. 34, n. 74.) Of county courts, *Id.* p. 39, n. 93.

14. Jurisdiction, Conflict of.—Where a person is properly in custody under State authority, the United States Circuit Court has no authority to take the accused by *habeas corpus* from such authority. (United States *v.* Rector, 5 *McLean*, 174; 9 *Opp. Att'y-Gen.* 713; see, also, Ableman *v.* Booth, 21 *How. U.S.* 506; *Exp.* Dorr, 3 *How. U.S.* 103.) Nor has a State court authority to remove a defendant from the custody of a court of the United States. (United States *v.* Rector, 5 *McLean*, 174; 9 *Opp. Att'y-Gen.* 713.) So, in extradition cases where a warrant has been issued by the Secretary of State, and is in the hands of the United States Marshall. (9 *Johns.* 239; Matter of Veremaitre, 9 *N.Y. Leg. Obs.* 137; 6 *Opp. Att'y-Gen.* 103, 713.) See, as to the power of United States courts in such cases, (*Exp.* Smith, 3 *McLean*, 121; Matter of Kaine,* 10 *N.Y. Leg. Obs.* 257; 14 *How. U.S.* 103.) So, also, in cases of enlistment. (Matter of O'Connor, 48 *Barb.* 258; 3 *Abb. Pr. (N.S.)* 137; Reilly's Case, 2 *Id.* 334; People *v.* Gaul, 44 *Barb.* 98; Matter of Martin, 45 *Barb.* 142.) As to issuance of writ in cases of enlisted soldiers, and of the authority of State courts in the issuance of the writ of *habeas corpus* in such cases, consult (Matter of Barrett, 42 *Barb.* 479; Matter of Graham, 8 *Jones L. (N.C.)* 416; Matter of Bryan, 1 *Wins. (N.C.)* No. 11; Matter of Rosenan, *Id.* 443.) It cannot inquire into the validity of an enlistment in the case of desertion. (See above cases, and see *Exp.* Anderson, 16 *Iowa*, 595.) Or where the prisoner is awaiting a trial before a court martial. Matter of Beswick, 25 *How. Pr.* 159.

15. Practice.—The proceedings on a writ of *habeas corpus* in the federal courts are governed by the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress shall see fit to prescribe, and not by the State Statutes. (3 *Pet.* 193; 2 *Brock. Marsh.* 447; *Exp.* Kaine, 3 *Blatchf.* 1.) So, in cases of aliens. (Matter of Barry, 7 *Law Rep.* 374.) A petitioner for a writ of *habeas corpus* is not entitled to a jury to try issues of fact. (Baker *v.* Gordon, 23 *Ind.* 204.) Upon a return of *habeas corpus*, in a case of arrest upon suspicion, and without a warrant, proof must be given to show the suspicion to be well founded. 2 *Inst.* 52; Matter of Henry, 29 *How. Pr.* 183.

16. Return of Writ.—Upon a return to a writ of *habeas corpus*, it is proper for the Court to look into the depositions taken before the committing magistrate, in order to ascertain whether there is probable cause to suppose that a felony has been committed by the prisoner.

(*People v. Smith*, 1 *Cal.* 9.) A return "that the person alleged to be detained was not within the control and custody of the party to whom the writ was directed, and that such person was beyond the jurisdiction of the Court, was held evasive and insufficient where such person had been removed in anticipation of the issuance of the writ. (*United States v. Davis*, 5 *Cranch C. Ct.* 622.) Attachment for not returning not issued until three days after service of the writ, (*United States v. Bollman*, 1 *Cranch C. Ct.* 373.) In Nevada, the warden of the State Prison may show that he holds the prisoner not only by virtue of a commitment, but also under sentence of the Court. *Exp. Salge*, 1 *Nev.* 449.

17. Who may Issue Writ.—The courts of the United States are empowered to issue the writ of *habeas corpus*. (1 *Stat. at L.* 81; 1 *Bright.* 301.) Either of the justices of the Supreme Court of the United States, as well as a judge of any United States District Court, may issue the writ. (See *Act of* 1789; *Id.*; see *Act of* 1833; 4 *Stat. at L.* 634; 1 *Bright.* 202; *Exp. Jenkins*, 2 *Wall. jr. C. Ct.* 521; *United States v. Morris*, 2 *Am. Law Reg.* 348; *Robinson*, 6 *McLean*, 355; *Thomas v. Crossin*, 3 *Am. Law Reg.* 207; consult, also, *Act of Congress*, 1842; 5 *Stat. at L.* 539; 1 *Bright.* 202.) By the Act of Congress of 1867, the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, were empowered to issue the writ of *habeas corpus*. As to proceedings thereon, consult (14 *Stat. at L.* 385, § 1.) This statute contains provisions regulating the use of the writ, which, in respect to certain cases, supersede many of the former enactments and the decisions under them. That the courts and judges of the United States may issue the writ, consult (*Exp. Smith*, 3 *McLean*, 121; *Matter of Keeler*, *Hempst.* 306; *Exp. Des Rochers*, 1 *McAll.* 68.) As to the Supreme Court, (3 *Dall.* 17; *Exp. Burford*, 3 *Cranch*, 448; *Exp. Bollman*, 4 *Id.* 75; *Exp. Watkins*, 7 *Pet.* 568; *Exp. Kearney*, 7 *Wheat.* 38.) But only in the exercise of its appellate jurisdiction. (*Exp. Milburn*, 9 *Pet.* 704; *Matter of Metzger*, 5 *How. Pr.* 176; *Matter of Kaine*, 14 *Id.* 103.) As to power of circuit courts, see (*Exp. Milligan*, 4 *Wall. U.S.* 3; *Exp. Smith*, 3 *McLean*, 121.) Of justice in vacation, see *Matter of Kaine*, 14 *How. U.S.* 103; *Exp. Barnes*, *Sprague*, 133.

*No. 1080.**Writ of Habeas Corpus.**

[VENUE.]

The People of the State of California, to A.B., greeting:

We command you, that you have the body of C.D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said C.D. shall be called or charged, before G. H., Judge of the Judicial District of the State of California, at the court room of the District Court of said District, in and for the City and County of San Francisco, on the day of, 18.., at o'clock in the noon of that day, to do and receive what shall then and there be considered concerning the said C.D. And have you then and there this writ.

Witness Hon., judge of the said District Court, at the court room thereof, in the City and County of San Francisco, this day of, 18...

Attest, my hand and the seal of the said Court, the day and year last above written. .

K.L.,

Clerk.

*By O.P.,

Deputy Clerk.

18. Issuance of Writ.—The writ should not issue to run out of the county, unless for good cause shown, as the absence, refusal or disability of the judge to act, or other reason, showing that the object and reason of the law requires its issuance. (*Exp. Ellis*, 11 Cal. 222.) In such case, resort may be had to officers out of the county. (*Id.*) Though the writ is a writ of right, it is not granted of course, but upon probable cause shown. (*United States v. Lawrence*, 4 Cranch C. Ct.

518; *Matter of Keeler*, *Hempst.* 307; *Exp. Vallandigham*, *Trial of Vallandigham*, 259; *Exp. Davis*, 4 *Law Rep. (N.S.)* 301.) As to when issuance will be refused, see (3 *Pet.* 193; 7 *Cush.* 285; *Hurd. Hab. Corp.* 223; *Exp. Vallandigham*, *Trial of Vallandigham*, 259.) That the allowance or refusal is matter of law and not of discretion, see (*Exp. Milligan*, 4 *Wall. U.S.* 3.) The act issuing the writ is purely ministerial, and in no sense judicial. (*People v. Nash*, 5 *Park. Cr.* 473; *Nash v. People*, 36 *N.Y.* 607; *Matter of Nash*, 16 *Abb. Pr.* 281; but to the contrary is *People ex rel. Ryan v. Russell*, 1 *Abb. Pr. (N.S.)* 230.) A writ will not be granted if it appears from the application, *prima facie*, that there is not sufficient ground for the discharge of the party imprisoned. *In Re Grozier*, 16 *Wis.* 423.

CHAPTER III.

QUO WARRANTO.

1. The writ of *quo warranto* is to prevent the usurpation of any office, franchise or liberty, and also to afford a remedy against corporations. (*Ex parte The Attorney-General*, 1 *Cal.* 85; *People v. Olds*, 3 *Cal.* 167.) Usurpation is defined the exercise or use of an office or franchise without authority. (3 *Bl. Com.* 262.) A person holding a certificate of election, without the right and legal title to the office, is an intruder, within the meaning of the Act. (*Palmer v. Woodbury*, 14 *Cal.* 43.) As to who is an intruder, see *People v. Jones*, 20 *Cal.* 50.

2. In Missouri, it has been held that a writ of *quo warranto* is in the nature of a writ of right for the State, against any person who claims or exercises any office, to inquire by what authority he supports his

claim, and it issues, as a matter of course, without any application to this Court. (*State v. Perpetual Ins. Co.*, 8 *Mo.* 330; *State v. Stone*, 25 *Mo.* 555.) In Illinois, when *quo warranto* is resorted to for the protection of private and individual rights, it is in substance, though not in form, a civil suit, and a change of venue will be allowed as in civil suits. (13 *Ill.* 581.) It is a civil proceeding, and the Circuit Court has jurisdiction thereof in St. Louis County, State of Missouri. (*State v. Lingo*, 26 *Mo.* 495.) See, as to action in general in various States and Territories of the Union, Vol. ii., p. 497, *et seq.*

3. Jurisdiction.—On petition of Attorney-General for a writ of *quo warranto* against a tax collector: *Held*, that the Court had no jurisdiction. (The Attorney-General *ex parte*, 1 *Cal.* 85.) The Supreme Court is not empowered to issue a writ of *quo warranto* to inquire by what authority a person exercises the duties of a collector of the foreign license tax. (*Id.*) Judges of the county courts and district judges have jurisdiction over the subject of contested elections. (*Saunders v. Haynes*, 13 *Cal.* 145.) This is one of the "special cases," of which the Constitution provides that the county judges may take cognizance, when authorized by the Legislature. (*Id.*) Who has jurisdiction to grant the writ. The Attorney-General *ex parte*, 1 *Cal.* 85; *Saunders v. Haynes*, 13 *Cal.* 145.

4. Office Generally.—What is a lucrative office, (*Palmer v. Woodbury*, 14 *Cal.* 43; *Saunders v. Haynes*, 13 *Cal.* 145; *People ex rel. Melony v. Whitman*, 10 *Cal.* 38.) Holding office, what constitutes, (*People ex rel. Melony v. Whitman*, 10 *Cal.* 38; see Vol. ii., p. 498.) As to salary of office, see (*Pond v. Maddox*, *Cal. Sup. Ct.*, Oct. T., 1869; see, also, Vol. ii., p. 502, n. 24.) Term of office, consult (*People ex rel. Fowler v. Wells*, 11 *Cal.* 329; *People ex rel. Fox v. Templeton*, 12 *Cal.* 394; *People ex rel. Attorney-General v. Burbank*, 12 *Cal.* 378; *Attorney-General v. Squires*, 14 *Cal.* 12; *People ex rel. Attorney-General v. Addison*, 10 *Cal.* 1; *Westbrook v. Rosborough*, 14 *Cal.* 180; *Brodie v. Campbell*, 17 *Cal.* 11; *People ex rel. Attorney-General v. Martin*, 12 *Cal.* 409; *The People ex rel. Melony v. Whitman*, 10 *Cal.* 38; *People ex rel. Fox v. Templeton*, 12

Cal. 394; *People ex rel. Brodie v. Weller*, 11 *Cal.* 77.) Change of term, see (*Christy v. Supervisors*, *Cal. Sup. Ct., Jan. T.*, 1870.) Who are eligible to office, *People ex rel. Melony v. Whitman*, 10 *Cal.* 38; but see *Brooks v. Melony*, 15 *Cal.* 58; *People v. Dorsey*, 32 *Cal.* 296.

5. Office Generally.—Election to office, time of, (*Jacobs v. Murray*, 15 *Cal.* 221; *People ex rel. Brodie v. Weller*, 11 *Cal.* 77; affirmed in *People v. Burbank*, 12 *Cal.* 378; *People ex rel. McKune v. Weller*, 11 *Cal.* 49; *Christy v. Supervisors of Sacramento*, *Cal. Sup. Ct., Jan. T.*, 1870; citing various statutes.) When proclamation necessary, (*Westbrook v. Rosborough*, 14 *Cal.* 180; *People v. Martin*, 12 *Cal.* 409; *People ex rel. McKune v. Weller*, 11 *Cal.* 49; *People ex rel. Fox v. Templeton*, 12 *Cal.* 394; *People ex rel. Attorney-General v. Burbank*, 12 *Cal.* 378.) Certificate of election. (*People v. Jones*, 20 *Cal.* 50; *Magee v. Supervisors of Calaveras County*, 10 *Cal.* 376; *Conger v. Gilmer*, 32 *Cal.* 75.) What will vitiate an election, (*Whipley v. McKune*, 12 *Cal.* 352.) Resignation of office. *Miller v. Board of Supervisors of Sacramento County*, 25 *Cal.* 97.

6. Office Generally.—Vacancy, what constitutes, (*People v. Whitman*, 10 *Cal.* 38; *Brooks v. Maloney*, 15 *Cal.* 58; *People v. Supervisors of Marin County*, 10 *Cal.* 344; see Vol. ii., p. 503, n. 29.) Appointment to fill vacancy. (*Conger v. Gilmer*, 32 *Cal.* 75; see Vol. ii., p. 499, n. 2.) Appointment may be rescinded, when, (*People v. Gilmer*, *Jan. T.*, 1867; *Conger v. Gilmer*, 32 *Cal.* 75.) Who may appoint to office. (*Attorney-General v. Squires*, 13 *Cal.* 12; *Palmer v. Woodbury*, 14 *Cal.* 43; *People v. Hill*, 7 *Cal.* 97; see *People ex rel. Shoaf v. Parker*, *Cal. Sup. Ct., Jul. T.*, 1869; see, also, *People ex rel. Baird v. Tilton*, *Cal. Sup. Ct., Jul. T.*, 1869.

7. Pleadings.—The name of the person entitled to the office may be set forth in the complaint. (*Cal. Pr. Act*, § 311.) An allegation that defendant is in possession of the office without lawful authority is a sufficient allegation of intrusion and usurpation. (*Palmer v. Woodbury*, 14 *Cal.* 43.) Plaintiff must show *prima facie* that a vacancy existed in the office, and that he was elected to fill it. (*Doane v. Scannell*, 7 *Cal.* 393.) It may be shown that a sufficient number of the votes cast for a person who received the certificate was illegal, to annul his majority, and his election may be set aside for that reason. (*People ex rel. Smith v. Pease*, 27 *N.F.* 45.) A certificate of election is not necessary to enable a party, claiming to have been elected, to

bring his action by *quo warranto*. (Magee v. Supervisors of Calaveras County, 10 Cal. 376.) In the case of an election, the issuance of a commission is a mere ministerial act. (Conger v. Gilmer, 23 Cal. 75.) What are not sufficient allegations, (Palmer v. Woodbury, 14 Cal. 43; Doane v. Scannell, 7 Cal. 393; *Id.* 439; see Vol. ii., p. 503, n. 28.) The Court will not grant a writ of *quo warranto* against an officer, to show by what authority he exercises his office, upon a general statement that he is disqualified. (*Ex parte* Bellows, 1 Mo. 115.) See, generally, as to pleadings in the various States and Territories, (Vol. ii., p. 497, *et seq.*) Who cannot demur. (Flynn v. Abbott, 16 Cal. 358.) As to defenses generally, see Vol. ii., p. 956, Notes 1, 2.

8. Proceedings.—An action may be brought against any party usurping any office or franchise. (Cal. Pr. Act, § 310.) In what name a proceeding in the nature of *quo warranto* is brought, see, generally, (*Exp.* Attorney-General, 1 Cal. 87; People v. Olds, 3 Cal. 175; People v. Scannell, 7 Cal. 439; Palmer v. Woodbury, 14 *Id.* 43; People v. Jones, 20 Cal. 50; Territory v. Lockwood, 3 Wall U.S. 236; *Burn* (Wis.) 215.) That contestant cannot take judgment by default, but must prove his allegations, see (Keller v. Chapman, 34 Cal. 635; see, also, Vol. ii., p. 497, n. 1.) In a special case to contest an election under the Statute, the County Court has no power to grant a new trial, and an appeal to the Supreme Court must be taken from the judgment, and a statement on appeal be made and settled, to enable the Supreme Court to review the proceedings below outside the judgment roll. (Cosgrove v. Howland, 24 Cal. 457.) In proceedings by the Attorney-General in the nature of *quo warranto*, for the dissolution of a corporation, the Court has no power to appoint a receiver before judgment except in case of insolvency. (People v. Washington Ice Co., 18 Abb. Pr. 382.) It seems the Court may in such case issue an injunction. As to the principles of determination in such cases, see (Cal. Pr. Act, § 312; see, also, Vol. ii., p. 498, n. 6.) When rendered in favor of applicant. (Cal. Pr. Act, § 313.) That damages may be recovered, see Cal. Pr. Act, § 314; see, also, §§ 315, 316.

9. When a Writ may Issue.—When the person is in office by color of right, and exercising the duties thereof, a *quo warranto* is the proper remedy, and not a *mandamus*. (Breese, 104; 17 Ill. 167; 1 Scam. 215; 2 Scam. 19; St Louis County Court v. Sparks, 10 Mo. 117.) An information in the nature of a *quo warranto* is the proper proceeding to try the title to an office. (People v. Scannell, 7 Cal. 432; Peo-

ple *ex rel.* Smith *v.* Pease, 27 *N.Y.* 45.) Where an act establishing a new county within the limits of an old one is unconstitutional, the sheriff of the old county may proceed by *quo warranto* against the person assuming to act as sheriff of the new county. (State *v.* Scott, 17 *Mo.* 521.) An action in the nature of an action of *quo warranto* will lie against a corporation of which a receiver has been appointed on account of insolvency. (People *ex rel.* Barton *v.* Rensselaer Ins. Co., 38 *Barb.* 323.) It is the proper mode of testing the forfeiture of a charter. (1 *Gilm.* 667; 32 *Ill.* 82.) The decision of the Superintendent of public instruction upon adverse claims to the title to the office of trustee of the School District is final, and an action in the nature of *quo warranto* will not lie after such decision. People *ex rel.* Hill *v.* Collins, 34 *How. Pr.* 336; see Vol. ii., p. 503, n. 30.

CHAPTER IV.

MANDAMUS.

1. The writ of *mandamus* may be denominated the writ of mandate. (*Cal. Pr. Act*, § 466.) It cannot be made to perform the functions of a writ of error. (Commissioners of Patents *v.* Whitely, 4 *Wall. U.S.* 522.) The distinction between writs of mandate and *quo warranto*, as held in England, is not abolished by the Statute of this State, but is fully recognized. People *v.* Olds, 3 *Cal.* 173.

2. *Mandamus* is a writ which issues out of a Supreme Court, directed to any person, corporation, or inferior court, requiring them to do some particular thing therein specified, which pertains to their office and duty, and which the Court issuing it has previously determ-

ined, or at least supposes to be consonant to right and justice. (2 *Blk. Com.* 110; 2 *Burr. Law Dict.* 177.) Its office may be to compel the action, but it cannot be to correct the errors of an inferior court. (State *ex rel.* Treadway *v.* Wright, 4 *Nev.* 119.) Nor to restrain the performance of duties. (Terry *v.* Stauffer, 17 *La. An.* 306.) It is issued principally for public purposes, and to enforce the performance of public rights or duties. Napa Valley R.R. Co. *v.* Napa County, 30 *Cal.* 435; see 2 *Burr. Law Dict.* 177; 3 *Bl. Com.* 110.

3. It issues to the judges of any inferior court, wherever justice has been delayed. (*Exp.* Crane, 5 *Pet.* 190.) The writ of *mandamus* is considered a writ of right. In modern practice, it is nothing more than an ordinary process, in cases where it is the appropriate remedy. (Kentucky *v.* Dennison, 24 *How. Pr.* 66.) That it is not a writ of right, see (People *v.* Hatch, 33 *Ill.* 9.) It is necessarily a summary proceeding; and it is very questionable whether the intervention of third persons can be legally entertained in a case involving important questions of public interest. State *v.* Wrotnowski, 17 *La. An.* 156.

4. **County Officers.**—Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons, as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of *mandamus* is the proper legal remedy. (Knox Co. *v.* Aspinwall, 24 *How. Pr.* 376; Lyell *v.* St. Clair County, 3 *McLean*, 580; see Rose *v.* County Commissioners, 50 *Maine*, 243.) Or to compel County Commissioners to empanel a new jury. (Mendon *v.* Worcester, 10 *Pick.* 236.) Or to compel distribution, for support of religion. (State *v.* Trustees, 2 *Ohio*, 108.) But not to compel county commissioners to remove the county seat. (Condit *v.* Bd. of Commr's, 25 *Ind.* 422.) It will be granted to compel an assessor to assess for taxation property

liable to be taxed, and which he neglects and refuses to assess. (*People v. Shearer*, 30 *Cal.* 645; *Gorgas v. Blackburn*, 14 *Ohio*, 252; 19 *Ohio*, 415.) Or to compel assessors to correct an erroneous assessment. (*People v. Olmsted*, 45 *Barb.* 644.) Or to compel a tax collector to execute and deliver to a person, paying his taxes in the coin therein designated, a receipt for the same. (*Perry v. Washburn*, 20 *Cal.* 318.) On behalf of one illegally assessed. (*People v. Barton*, 44 *Barb.* 148.) As against commissioners of jurors, see (*People v. Taylor*, 45 *Barb.* 129.) A *mandamus* will not lie against a County Treasurer to compel him to pay interest due on county bonds. (*People ex rel. Talant & Wilde v. Fogg*, Treasurer, 11 *Cal.* 351.) Or to pay over school money. (*State v. White*, 17 *Ohio*, 32.) But it will lie to compel a county auditor to pay a county debt. *Barnett v. Auditor of Portage*, 12 *Ohio*, 54; *State v. Treas. of Wood*, 17 *Id.* 184; *State v. Auditor of Hamilton*, 19 *Ohio*, 116.

5. Governor of State.—*Mandamus* will issue to the Governor in certain cases. (*McCauley v. Brooks*, 16 *Cal.* 11) A writ of mandate will be issued to compel the Governor to sign a patent, unless the law has vested him with discretionary powers in that respect. (*Middleton v. Low*, 30 *Cal.* 596.) So as to land embraced in a sixteenth and thirty-sixth sections, not surveyed by the United States. (*Id.*) When a ministerial duty affecting a private right is specially devolved on the Governor by law, which the Legislature might have devolved on any other State officer, he may be compelled to perform the same by a writ of mandate. (*Id.*) A *mandamus* lies to compel the Governor of Maryland to issue a commission to which the petitioner is entitled under the State Constitution, that being a ministerial act. (*Magruder v. Swann*, 25 *Md.* 175; see *Magruder v. Tuck*, *Id.* 217.) The Supreme Court has no authority to issue a *mandamus*, to compel a Governor of a State to return to another State a fugitive from justice. *Kentucky v. Dennison*, 24 *How. Pr.* 66.

6. Government.—If all pre-emption laws should be repealed and never re-enacted, a party who has merely entered as a pre-emptioner, without payment, would have no right which he could enforce against the Government. He would have no action for damages, and could not compel the issuing of a patent by *mandamus*. *Hutton v. Frisbie*, *Cal. Sup. Ct., Jul. T.*, 1869; see 8 *Opin's of Attorney-General*, 71; 10 *Id.* 57; 11 *Id.* 491; see, also, *Bower v. Higbee*, 9 *Mo.* 261; *O'Hanlon v. Perry*, *Id.* 808; *Hall v. Gaines*, 22 *How. U.S.* 161.

7. Jurisdiction.—The power to issue the writ of *mandamus* is generally confided to the highest court of original jurisdiction. (*Kendall v. United States*, 12 *Pet.* 524; affirming 5 *Cranch C. Ct.* 163.) It cannot be issued by a court having simply appellate powers. (*Howell v. Crutchfield*, *Hempst.* 99.) For the extent of the power of the Circuit Court to issue writs of *mandamus*, see (*McIntire v. Wood*, 7 *Cranch*, 504; *Exp. Hennen*, 13 *Pet.* 225; *Knox County v. Aspinwall*, 24 *How. Pr.* 376; *Smith v. Jackson*, 1 *Paine*, 453.) To municipal corporations, see (*United States v. Mayor etc.*, 2 *Am. Law Reg. (N.S.)* 394; following, 24 *How. U.S.* 376; see *Crowell v. Lambert*, 10 *Minn.* 369.) A superior court will never prescribe how the discretion of an inferior tribunal shall be exercised; but will in proper cases require an inferior court to decide. (*Life and Fire Ins. Co. of N.Y. v. Wilson*, 8 *Pet.* 291.) Or it may require an inferior court to proceed to judgment. (*Exp. Many*, 14 *How. Pr.* 24; *Life and Fire Ins. Co. of N.Y. v. Adams*, 9 *Pet.* 573.) In the exercise of its ordinary appellate jurisdiction, the Supreme Court can take cognizance of no case, until a final judgment or decree shall have been made in the inferior court. *Id.*

8. Jurisdiction.—The Supreme Court of California has original jurisdiction in cases of *mandamus* under the Constitution, as amended in 1863. (*Tyler v. Houghton*, 25 *Cal.* 26.) So, it can issue a *mandamus* in a proper case in aid of its appellate jurisdiction. (*People v. Weston*, 28 *Cal.* 639, and authorities there cited.) The Supreme Court of California has no jurisdiction by its writ of mandate, when directed to a person who acts in his judicial or deliberative capacity, except to compel a performance of his official duty by acting and deciding in the premises to the best of his judgment. (*Francisco v. Manhattan Ins. Co.*, 36 *Cal.* 283.) The fourth section of the sixth article of the Constitution of the State, as amended in 1863, confers upon the district courts original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition and *habeas corpus*. (*Perry v. Ames*, 26 *Cal.* 381; affirmed in *Courtwright v. B. R. and A. W. and M. Co.*, 30 *Cal.* 583.) Regardless of the amount involved. (*Cariaga v. Dryden*, 30 *Cal.* 244.) As to jurisdiction of county courts in *mandamus*, see (*Jacks v. Day*, 15 *Cal.* 91; see, also, Vol. i., p. 38.) A State court has no jurisdiction to issue a *mandamus* to an officer commissioned by the United States. His conduct can only be controlled by the power that created the office. (*McClary v. Silliman*, 6 *Wheat.* 598.)

9. Ministerial Offices.—*Mandamus* may be resorted to, to

compel an officer to do an act which is sought to be enforced, in all cases where the officer has no discretion, and where he is under obligation to do the specific act. (The People *ex rel.* McDougall *v.* Bell, 4 Cal. 176; Flayley *v.* Hubbard, 22 Cal. 36.) A *mandamus* will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase-money, on the ground that he is entitled to it as oldest judgment- and execution-creditor; especially when there is an unsettled contest as to the priority of his lien. (Williams *v.* Smith, 6 Cal. 91.) The Supreme Court will not issue a *mandamus* to the clerks of the district courts in the first instance. (Cowell *v.* Buckelew, 14 Cal. 640.) A *mandamus* will not lie against the Clerk of the District Court, to compel him to issue execution on a money judgment rendered in the Court of which he is clerk. (Goodwin *v.* Glazer, 10 Cal. 333.) *Mandamus* will lie to compel the Clerk of the Common Council to make publication of certain notices which it is his duty to publish. (Washington *v.* Page, 4 Cal. 388.) But not to countersign bonds. (People *v.* San Francisco, 27 Cal. 655.) So, it will lie to compel a town clerk to deliver the town record to his successor. Taylor *v.* Henry, 2 Pick. 397; Walter *v.* Belding, 24 Vt. 658; Commissioners *v.* Athearn, 3 Mass. 287; Sudbury *v.* Stevens, 21 Pick. 148.

10. Municipal Corporations.—Boards of supervisors and bodies like them, without any legislative provision—by general law—are subject, with certain exceptions, to *mandamus* to enforce the performance of the duties devolved upon them. (Hastings *v.* City and County of San Francisco, 18 Cal. 49.) The board of supervisors act ministerially in the issuance of bonds under this Act, and *mandamus* lies if they improperly refuse. (C. N. R.R. Co. *v.* Butte Co., 18 Cal. 671.) Or the issue of stock. (People *v.* Common Council of N.Y., 45 Barb. 473.) So, where the board of supervisors of a county are empowered to subscribe for the County to the capital stock, and may be compelled to subscribe by writ of mandate. (Napa Valley R.R. Co. *v.* Napa Co., 30 Cal. 435.) Where it is their duty to provide for the payment of judgments, they must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation. (People *ex rel.* Frank *v.* San Francisco, 21 Cal. 668.) And *mandamus* may compel such levy. (Hoffman *v.* City of Quincy, 4 Wall. U.S. 535; Supervisors *v.* United States, *ex relatione*, 4 Wallace U.S. 435; Coy *v.* Lyons City, 17 Iowa, 1.) Where, however, they act in the exercise of their discretion, there is no authority to interfere with

their determination. (*Thomas v. Armstrong*, 7 *Cal.* 287; *Fall v. Paine*, 23 *Cal.* 302; 21 *Id.* 668.) But when they act under mistake of law, the error may be corrected by *mandamus* or any other proper proceeding. (*Thomas v. Armstrong*, 7 *Cal.* 287; *Fall v. Paine*, 23 *Id.* 302; 21 *Id.* 668.) So, in awarding a ferry franchise. *Id.*

11. Municipal Corporations.—*Mandamus* does not lie to compel the supervisors of a county to order a special election to fill vacancies in the office of assessor and sheriff. (*The People v. Supervisors of Santa Barbara Co.*, 14 *Cal.* 102; see *Magee v. Bd. Supervisors*, 10 *Id.* 376.) A *mandamus* to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account, and issue warrants accordingly. (*Tuolumne Co. v. Stanislaus Co.*, 6 *Cal.* 440.) As to law concerning intelligence offices, see (*Hall v. Supervisors*, 20 *Cal.* 591.) *Mandamus* is the proper proceeding to try the question whether a board of supervisors have the power to oppose a claim against a county. (*People v. Supervisors*, 28 *Cal.* 429.) Or to compel a board to audit and allow the claims of county officers, etc. (*People v. Supervisors of N.Y.*, 32 *N.Y.* 473.) But such writ does not control or prescribe the mode, or determine the result of their action. *People ex rel. Gas Co. v. Supervisors of San Francisco*, 11 *Cal.* 42; 6 *Id.* 440; 9 *Id.* 150; *Price v. Sacramento Co.*, 6 *Cal.* 254.

12. Nature of Remedy.—The writ of *mandamus* is the proper remedy to compel inferior tribunals to perform the duties required of them by law. (*Strong, Petitioner*, 20 *Pick. Rep.* 484; *Carpenter v. Bristol*, 21 *Id.* 258; *Commonwealth v. Hamden*, 2 *Pick. Rep.* 414; *Chase v. Blackstone Canal*, 10 *Id.* 244; *Springfield v. Hamden*, 4 *Id.* 68; *Johnson v. Randall*, 7 *Mass. Rep.* 340.) To compel judges to hold their courts, and county officers to keep their offices at a county seat. (*Calaveras County v. Brockway*, 30 *Cal.* 325.) A writ of *mandamus* is not the appropriate remedy for orders made in a cause, by a Judge, in the exercise of his authority, although they may bear harshly upon the party. Nor to compel any person, inferior officer, court or corporation, to act in any particular manner, when such persons, officer, court or corporation is invested with discretionary power. (*McDougall v. Bell*, 4 *Cal.* 177; *People ex rel. Hagley v. Hubbard*, 22 *Cal.* 34; *People v. Weston*, 28 *Cal.* 640, and authorities there cited; *People v. Pratt*, 28 *Cal.* 166; *Exp. Whitney*, 13 *Pet.* 404; *Gaines v. Relf*, 15 *Id.* 9.) That discretion cannot be controlled by this writ, but if it refuses to exercise its discretion, a *mandamus* will lie to compel it

to do so, (*Gun v. Pulaski County*, 3 *Pick. Rep.* 427; *Exp. Broadstreet*, 8 *Pet.* 588; *The People v. Supervisors of Westchester*, 12 *Barb. Rep.* 446; *The State v. Todd*, 4 *Ohio Rep.* 357; *Matter of Turner*, 5 *Ohio Rep.* 542; 3 *Binney Rep.* 273; *Roberts v. Holesworth*, 5 *Halst. Rep.* 57.

13. Quo Warranto.—*Mandamus* may issue to restore a person to office from which he has been illegally removed. (*Singleton v. Commissioners*, 2 *Bay. Rep.* 105; *Den v. Judges*, 3 *Hen. & M.* 1; *Street v. Gallatin County Commissioners*, *Breese Rep.* 75.) Or to compel the admittance of one to an office from which he is unlawfully excluded. (*Strong, Petitioner*, 20 *Pick. Rep.* 484.) If a county judge refuses to appoint commissioners to appraise land, in a proceeding to condemn the same, a writ of mandate will be issued compelling him to do so. *Lake Merced Water Company v. Cowles*, 31 *Cal.* 215; *United States v. Guthrie*, 17 *How. U.S.* 284.

14. Religious Corporations.—A *mandamus* may issue to compel a religious corporation to admit a minister to the pulpit. (*Runkel v. Winemiller*, 4 *Har. & M.* 429; *People ex rel. Griffen v. State* 1 *Edm.* 505.) But not to restore a minister to his clerical rights and functions, where there are no fees or emoluments attached to his office. (*Union Church v. Saunders*, 1 *Houston*, 100.) It may issue to compel the clerk or treasurer of a religious society to deliver the records to his successor. *St Luke's Church v. Slack*, 7 *Cush.* 226.

15. State Officers.—*Mandamus* will issue to compel the Secretary of the State of Louisiana to affix his official signature. (*State v. Wrotnowski*, 17 *La. An.* 156.) But it will not compel the Secretary of State to certify a bill or an enrolled act to be a law, which is not among the archives of his office. (*People v. Hatch*, 33 *Ill.* 9.) It may issue to compel a Secretary of State to deliver a commission. (*Morberry v. Madison*, 1 *Cranch*, 137.) Where it was the duty of the controller to have issued warrants upon the treasury for the sums claimed under a State Prison contract, the performance of this can be enforced by *mandamus*. (*McCauley v. Brooks*, 16 *Cal.* 11; *Page v. Harding*, 8 *B. Monr.* 648.) A *mandamus* may issue to compel the Comptroller of State to account to a member of the Legislature for the daily compensation fixed by law. (*Fowler v. Pierce*, 2 *Cal.* 165; *McCauley v. Brooks*, 16 *Cal.* 11.) As no action can be maintained against the State, the Court will not permit a claim to be enforced circuitously by

mandamus against the Treasurer. (*Weston v. Dane*, 51 *Maine*, 461.) *Mandamus* may issue to compel the Speakers of two houses to issue a certificate of election. *State v. Moffit*, 5 *Ohio*, 358.

16. **What Writ shall Issue.**—When the application to the Court is made without notice to the adverse party, and the writ be allowed, the alternative shall be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. *Cal. Pr. Act*, § 470.

17. **When Writ may Issue.**—The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. (*Cal. Pr. Act*, § 468; *People ex rel. McDougall v. Bell*, 4 *Cal.* 176; *Flagley v. Hubbard*, 22 *Cal.* 36; *Merced Mining Co. v. Fremont*, 7 *Cal.* 130.) And only in cases where the act to be done is merely ministerial. (*Draper v. Noteware*, 7 *Cal.* 276; *United States v. Guthrie*, 17 *How. U.S.* 284; *United States v. Leaman*, *Id.* 225.) When the effect of the application is to bring under review the decision of a district court, the appellate jurisdiction given by the Constitution attaches, and may be exercised by the means of the writ of *mandamus*. (*The People v. Turner*, 1 *Cal.* 143.) So, it may issue to compel a court to certify a case to the Circuit Court of the United States. (*State v. Hamilton*, 3 *Ohio*, 49; see *Spraggins v. County Court of Humphries*, 1 *Cooke (Tenn.)* 160; but see, in certain cases, *Ladd v. Tudor*, 3 *Woodb. & M.* 325.) It is the only adequate mode of relief where an inferior tribunal refuses to act upon a subject brought properly before it. *Life and Fire Ins. Co. of New York v. Wilson*, 8 *Pet.* 29.

18. **When Writ may Issue.**—The Supreme Court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers, and its authority to issue process necessary to give them effect. (*Purcell v. McKune*, 14 *Cal.* 231; *Smith v. Jackson*, 1 *Paine*, 453; *Matter of Turner*, 5 *Ohio*, 542, 544.) An order made in an action pending in the District Court, staying all proceedings therein until the further direction of the Court, is not an appealable order. The remedy of a party prejudiced thereby is by application for a *mandamus* to compel the Court to proceed. (*Rhodes v. Craig*, 21 *Cal.* 419.) So of an order expelling certain attorneys from the bar, on the ground that they had set at defiance the authority of the Court. (*People v.*

Turner, 1 *Cal.* 143.) A *mandamus* is the proper remedy to compel their restoration. (*Id.*; Herring *v.* Sawyer, *Cal. Sup. Ct.*, *Oct. T.*, 1868; see *Ex parte* Bradley, 7 *Wall. U.S.* 364; People *v.* Justices of Delaware, 1 *Johns. Cas.* 181; Withers *v.* State, 36 *Ala.* 252.) Where the act of signing a judgment is merely ministerial, a *mandamus* may issue requiring the Judge of an inferior court to do it. (Life and Fire Ins. Co. of N.Y. *v.* Wilson, 8 *Pet.* 291.) So, upon an affidavit showing that the judge has neglected or refused to enter judgment. (*Exp.* Bradstreet, 6 *Pet.* 774.) To enter judgment on the report of a referee. In this case there was no remedy by appeal. (Russell *v.* Elliott, 2 *Cal.* 245.) Or to compel a justice of the peace to enter a judgment of discontinuance. (Anderson *v.* Pennie, 32 *Cal.* 265; Foreman *v.* Murphy, 2 *Penn.* 1024; Cortelyou *v.* Ten Eyck, 2 *N.F.* 45; Haight *v.* Turner, 2 *Johns.* 371; Jared *v.* Hill, 1 *Blackf.* 155; 5 *Mass.* 435; 9 *Id.* 388; 7 *Id.* 340.

19. When Writ may Issue.—But when the act to be done is judicial or discretionary, the writ will not direct what decision shall be made, nor will it be granted after the inferior tribunal has acted for the purpose of reviewing the legality of its decision. (People *v.* Sexton, 24 *Cal.* 78.) A *mandamus* may issue to compel a judge to settle a bill of exceptions first, and then to sign it. (The People *v.* Lee, 14 *Cal.* 512; People *v.* Judges, 1 *Caines*, 511; McDonald *v.* Sheldon, 2 *Kans.* 321; State *v.* Todd, 4 *Ohio*, 351.) Or a statement on motion for a new trial. (People *v.* Rosborough, 29 *Cal.* 415.) Or to set aside the grant of a new trial. (People *v.* Superior Court, 10 *Wend.* 285.) A peremptory writ of *mandamus* is a proper remedy to enforce delivery of books, papers, etc., to a newly elected judge of probate. Crowell *v.* Lambert, 10 *Minn.* 369.

20. When Writ may Issue.—Where, pending a motion for a new trial in the District Court, the defendants violate an injunction previously issued by said District Court, this Court will issue a *mandamus* against the Judge of such District Court, to compel him to issue his attachment for contempt. (Ortman *v.* Dixon, 9 *Cal.* 23; Merced Mining Co. *v.* Fremont, 7 *Cal.* 130.) A *mandamus* will issue from a superior to an inferior court to compel the issuance of an attachment for contempt, where the proceeding is, in substance, a private right, though in form a case of contempt. (Merced *v.* Fremont, 7 *Cal.* 130.) The Court may grant a peremptory *mandamus* to compel a district judge to execute a sentence pronounced by him, although subsequently

to its rendition an Act of the Legislature of the State comprising the district was passed, authorizing the Governor of the State to prevent its execution. *United States v. Peters*, 5 *Cranch*, 115.

21. When it will not Issue.—A *mandamus* will not lie where a party may have a remedy by writ of error. (*United States v. Addison*, 22 *How. U.S.* 174; *Commissioners of Patents v. Whitney*, 4 *Wall. U.S.* 522.) As on an order punishing for contempt. (*People v. Turner*, 1 *Cal.* 152.) Nor where there is any other specific, speedy, and adequate remedy. (*Crandall v. Amador*, 20 *Cal.* 72; *People v. Olds*, 3 *Cal.* 175; *Bigelow v. Grove*, 7 *Cal.* 133; *Louisville R.R. Co. v. State*, 25 *Ind.* 177.) And one competent to afford relief upon the very subject matter. (*Fremont v. Crippen*, 10 *Cal.* 211; 7 *Cal.* 276.) Nor will it lie if the right of the party applying therefor is not clear. (*United States v. Bank of Alexandria*, 1 *Cranch C. Ct.* 7; *The State v. Justices of Moore*, 2 *Iredell Rep.* 430; *People v. Brooklyn*, 1 *Wend. Rep.* 318.) The general rule that a *mandamus* will not lie where the party has another remedy must be understood to refer to some specific remedy which will place the party in the same situation in which he was before the act complained of. (*Etheridge v. Hall*, 7 *Porter*, 47; *The People v. Supervisors of Green*, 12 *Barb.* 217; 17 *Ala. Rep.* 527; 13 *Penn. State Rep.* 72.) As where there is a remedy by appeal, as to compel the entry of a decree on the report of a referee. (*Ludlum v. Fourth District Court*, 9 *Cal.* 12.) So, from an order modifying an injunction. (*Fremont v. Merced Mining Co.*, *Id.* 18.) So, from order denying the trebling of damages in forcible entry and detainer. (*Early v. Mannix*, 15 *Cal.* 149.) So, where a court refuses to enter judgment for costs. (*Peralta v. Adams*, 2 *Cal.* 594.) Or a judgment of dismissal. (*People v. Pratt*, 28 *Cal.* 166; see *Exp. Spring Valley Water Works*, 17 *Cal.* 132; *Exp. Bradstreet*, 7 *Pet.* 634.) A claim to a writ of *mandamus* cannot be sustained if there is any other equally effectual remedy. *Bush v. Beavan*, 1 *Hurl. & Coll.* 500.

22. When it will not Issue.—*Mandamus* will not lie to compel a court to proceed with the trial after an order changing the place of trial. Or where the District Court refuses to transfer an indictment to another district court for trial. (*Smith v. Judge of Twelfth District*, 17 *Cal.* 547.) Nor to command him to recall an order after final judgment, if an appeal could be taken. (*People v. Moore*, 29 *Cal.* 427.) Nor to compel a county judge to recall an order and to enter a stay of proceedings. (*People v. Moore*,

29 *Cal.* 427.) Nor to compel a circuit judge to vacate an order. (*State v. Taylor*, 19 *Wis.* 566; see, generally, *State v. Carney*, 3 *Kans.* 88.) Nor where a court refuses to proceed for want of a statement, in a chancery case. (*Purcell v. McKune*, 14 *Cal.* 230.) Nor for refusal or allowance of a change of venue. (*People ex rel. Hagley v. Hubbard*, 22 *Cal.* 834.) Nor to reinstate a case when the appeal has been dismissed, even if the Court acted erroneously in dismissing it. (*People v. Weston*, 28 *Cal.* 639; *Lewis v. Barclay*, 35 *Cal.* 213.) In a matter in which the County Court has final jurisdiction, and acts, there is no remedy, even if it acts erroneously. (*Lewis v. Barclay*, 35 *Cal.* 213.) As in the entering of judgment. (*Cariaga v. Dryden*, 27 *Cal.* 307.) Or the filling of a blank in a judgment with the amount of costs, after judgment was affirmed by the Supreme Court. *Exp. Many*, 14 *How. U.S.* 24.

23. When it will not Issue.—*Mandamus* lies to compel an inferior tribunal to perform a duty enjoined by law; but if the duty is judicial the writ cannot prescribe what the decision of the inferior tribunal shall be. (*Lewis v. Barclay*, 35 *Cal.* 213.) The remedy is then by appeal. (*People v. Pratt*, 28 *Cal.* 166; see 28 *Cal.* 641.) The Supreme Court will not issue a *mandamus* to compel a district judge to decide contrary to his own judgment. (*United States v. Lawrence*, 3 *Dall.* 42.) Nor to compel a judge to issue a warrant of arrest in a particular case. (*Id.*) Nor to re-examine a decision on the sufficiency of the affidavit to hold to bail. (*Exp. Taylor*, 14 *How. Pr.* 3.) Nor to compel a district court to expunge amendments improperly made in the record returned to the Circuit Court on a writ of error. (See *Spraggins v. County Court of Humphries*, 1 *Cooke (1enn.)* 160; *Smith v. Jackson*, 1 *Paine*, 453.) Nor to compel a judge to allow a defendant to take possession of goods provisionally seized, upon his depositing in court a sum to be fixed by the judge. (*State v. Judge of the Third District*, 17 *La. An.* 328.) Nor to compel a district court to review its judgment. (*Exp. Hoyt*, 13 *Pet.* 279.) Nor to permit an allowance of double pleas. *Exp. Davenport*, 6 *Pet.* 611.) Nor to permit the intervention of new parties. (*White v. United States*, 1 *Black.* 501.) Nor will it compel a court to withdraw an issue, and direct a new issue to be made up. *Bank of Columbia v. Sweeny*, 1 *Pet.* 567.

24. Who may Issue Writ.—It may be issued by any court in this State, except a justice's, recorder's or mayor's court, to any inferior tribunal, corporation, board or person, to compel the performance of

an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded. (*Cal. Pr. Act*, §467; *Barron v. Bost*, *Cal. Sup. Ct., Apl. T.*, 1868.) But it will not be issued to admit a person to office, while another holds it under color of right. *State v. Auditor*, 36 *Mo.* 70.

No. 1081.

Alternative Mandamus.

[TITLE.]

The people of the State of California,
To [*the tribunal, corporation, board, or person to whom
it is directed*], greeting:

Whereas it manifestly appears to us by the affidavit of J.Q., on the part of the said A.B., the plaintiff and the party beneficially interested herein, that [*state generally the allegation against the party to whom it is directed*], and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore, we do command you, that immediately after the receipt of this writ, you do [*the act required to be performed*], or that you show cause before this Court, at the court room thereof, in the City Hall, in the County of, on the day of, 18..., at the opening of the court on that day, why you have not done so.

Witness, the Hon. J.P., Judge of our District Court of the Judicial District of the State of California, at the, in the County of, and the seal of said Court, this day of, 18...

NOTE.—The form of petition or affidavit is not given, as it is like any affidavit or complaint in other proceedings. The facts should be set out.

25. Disobedience of Writ.—The Legislature has declared that an officer, for willful disobedience to the mandate of the Court, shall be guilty of a misdemeanor in office. (*Cal. Pr. Act*, § 479; *McCauley v. Brooks*, 16 *Cal.* 56.) Or the Court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned for a period not exceeding three months, and may make any orders necessary and proper for the complete enforcement of the writ. (*Cal. Pr. Act*, § 479.) As to enforcement of penalty or fine, see *Id.*

26. Form of Writ.—The writ shall be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the Court, at a specified time and place, why he has not done so. The peremptory writ shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded shall be omitted, and a return day shall be inserted. (*Cal. Pr. Act*, § 469.) The writ must recite all the facts entitling the relator to have the act done for which he asks. (*Commonwealth Bank v. Canal Com'rs*, 10 *Wend. Rep.* 25.) It is not enough to refer to the petition and affidavits. (*Id.*; *The People v. Sup. of Westchester*, 15 *Barb. Rep.* 607.) The command of the writ must be according to the duty. (*The People v. Sup. of Dutchess*, 1 *Hill, Rep.* 50; *The People v. Sup. New York*, *Id.* 362.) The writ must correspond to the order directing its issue. (*Hawkins v. Moore*, 3 *Pike Rep.* 345.) One and the same writ cannot be directed to two several townships. (*State v. Chester & Evesham*, 5 *Halst. Rep.* 292.) It is not fatal if it be directed to the members of a corporation, instead of the corporation by its corporate name. (*Fuller v. Plainfield Academic School*, 6 *Conn. Rep.* 532.) For forms of writ of *mandamus*, commanding City Council to direct City Treasurer to pay claims allowed by School Board, see *State v. Cincinnati*, 19 *Ohio Rep.* 182.

No. 1082.

Peremptory Mandamus.

[TITLE.]

The People of the State of California,
To [*the tribunal, corporation, board, or person to whom
it is directed*], greeting:

Whereas it manifestly appears to us by the affidavit of J.Q., on the part of the said A.B., the plaintiff and the party beneficially interested herein, that [*state generally the allegation against the party to whom it is directed*], and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore, we do command you, that immediately after the receipt of this writ, you do [*the act required to be performed*].

Witness, the Hon. J.P., Judge of the District Court of the Judicial District of the State of California, at the court house in the County of, and the seal of said Court, this day of, 18...

J. K.,

Clerk.

By L. M.,

Deputy Clerk.

27. **Peremptory Mandamus** ordered, requiring Supervisors to levy a tax as provided for in the fifth section of the Act of May 14th, 1861, to provide a sinking fund for the redemption of bonds, *Soher v. Supervisors of Calaveras, Cal. Sup. Ct., Jan. T., 1870.*

PROCEEDINGS AND PRACTICE ON MANDAMUS.

28. Affidavit.—It shall be issued upon affidavit, on the application of the party beneficially interested. (*Cal. Pr. Act*, § 468; *People v. Pacheco*, 29 *Cal.* 210; *Exp. Fleming*, 2 *Wall. U.S.* 759.) It must be shown distinctly by the affidavits that the possession under a writ of restitution was acquired under the parties or subsequent to the filing of a *lis pendens*, or the application will be denied. *Fogarty v. Sparks*, 22 *Cal.* 143.

29. Demand a Condition Precedent.—"It is an imperative rule of the law of *mandamus* that previously to the making of the application to the Court for the writ to command the performance of a particular act, an express and distinct demand or request to perform it must have been made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively implied—it being due to the defendant to have the option of either doing or refusing to do that which is required of him before an application shall be made to the Court for the purpose of compelling him." *People v. Romero*, 18 *Cal.* 90; *Crandall v. Amador County*, 20 *Id.* 72; *Oroville and Virginia City Railroad Co. v. The Supervisors of Plumas County, Cal. Sup. Ct., Apl. T.*, 1869.

30. Determination.—Judgment may be affirmed as to the *mandamus*, and reversed as to the costs. (*McDougal v. Roman*, 2 *Cal.* 80.) The proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* cannot determine these rights, or in any respect the interest of third parties. *McMillan v. Richards*, 9 *Cal.* 365.

31. Hearing.—The case shall be heard by the Court, whether the adverse party appear or not. (*Cal. Pr. Act*, § 470.) On *mandamus* by the assignee of a sheriff's certificate of sale to compel the execution of a deed, the question whether such certificate is not merged in a deed made to the assignee by the execution-debtor after the sale cannot be tried. (*People v. Irwin*, 14 *Cal.* 428.) If no answer be made, or if the answer raise no material issue of fact, the hearing shall be before the Court. *Cal. Pr. Act*, § 476.

32. Issues, how Tried.—In *mandamus*, if an essential question of fact is raised, the Court may order a jury trial. (*Cal. Pr. Act*, § 472; *People v. Judge of the 10th Judicial District*, 9 *Cal.* 19.) If a question of fact arises upon issues joined in the Supreme Court, that Court will refer the matter to a district court to try and determine the special fact in issue, and return the fact to the Supreme Court. *Calaveras County v. Brockway*, 30 *Cal.* 325.

33. New Trial.—If either party be dissatisfied with the verdict of the jury, he may move for a new trial upon a statement prepared as provided in Section one hundred and ninety-five. The motion for a new trial may, upon reasonable notice, be brought on before the Judge of the Court in which the cause was tried, either in term or vacation. If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party, a new trial shall not be had. (*Cal. Pr. Act*, § 474.) If no notice for a new trial be given, or if given, be denied, the Clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the court in which the application for the writ is pending a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party. *Cal. Pr. Act*, § 475.

No. 1083.

Notice of the Application.

To:

You are hereby notified that will apply to the District Court within and for the County of, on the first day of its next term, for a writ of *mandamus* to issue against you, commanding you [*here state the prayer of the petition, and so much of the facts as shows what the party is required to do*].

[SIGNATURE.]

[DATE.]

34. Notice of Application.—The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default. (*Cal. Pr. Act*, § 470.) Where notice of the motion, and a copy of the papers on which the motion is founded, have been duly served on the District Judge, this Court may, in its discretion, issue either an alternative, or a peremptory writ, in the first instance. *People v. Turner*, 1 *Cal.* 143.

35. Proceedings, where Commenced.—Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner can be commenced in the county where the relator resides. (*McMillan v. Richards*, 9 *Cal.* 420.) The provisions of the Statute that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, and not to mere omissions or neglect of official duty. (*McMillan v. Richards*, 9 *Cal.* 365.) The rules of the Civil Practice Act are applicable to pleadings and proceedings in *mandamus*. *People v. Supervisors of San Francisco*, 27 *Cal.* 655.

36. Relief Awarded.—If judgment be given for the applicant, he shall recover the damages which he shall have sustained, as found by the jury, or as may be determined by the Court or referees upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate shall also be awarded without delay. (*Cal. Pr. Act*, § 477.) Where an alternative writ is not procured, the Court may grant any relief consistent with the case made by the petition and embraced within the issue, although it may be only part of that asked in the prayer of the petition. *People v. Supervisors of San Francisco*, 27 *Cal.* 665.

37. Return.—The return, to be sufficient, must show a legal justification. (12 *Ohio Rep.* 54.) As that a bill of exceptions tendered was not a true bill. (4 *Id.* 351.) When objectional, the Judge should return the causes of objection. (*The People v. Pearson*, 2 *Scam. Rep.* 189.) In a return to a *mandamus* to restore a member to a church, the power of those to expel him should be stated. (*Green v. Af. Meth. Ch.*, 1 *Sand. R.* 254.) The return must respond to all the allegations of the writ. (14 *Ohio Rep.* 252.) Under the Code, issue may be taken on the truth of the return. At common law, the return was conclusive. (*The State v. Will. Bridge Co.*, 3 *Harring. R.* 539.) The return may be amended. (*Springfield v. Hamden*, 10 *Pick. Rep.* 59.) The

proper way for the justices of a county to make return to a *mandamus*, is for them to convene, and a majority being present, to fix upon the facts they mean to rely on by way of defense, and appoint some one of their body to make affidavit and to do all other things required by the proceeding. *Lander v. McMillan*, 8 *Jones L. (N.C.)* 174.

38. Service of Writ.—The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the Court. *Cal. Pr. Act*, § 478.

PLEADINGS IN MANDAMUS.

39. Answer.—On the return of the alternative, or the day on which the application of the writ is noticed, or such further day as the Court may allow, the party on whom the writ or notice shall have been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action. (*Cal. Pr Act*, § 471.) The answer of a Board of Supervisors should be in form the answer of the Board in its aggregate capacity. (*People v. Supervisors*, 27 *Cal.* 665.) And the fact that it was sworn to by one member of the Board does not make it his answer, nor is it necessary that such answer should aver that the Board by resolution adopted it. (*Id.*) If two answers filed, each in form of the answer of the board, the Court may ascertain which is the return of the majority. (*Id.*) As to answer of treasurer on demand made upon him to pay a warrant drawn by the auditor, see *Keller v. Hyde*, 20 *Cal.* 594; *Connor v. Morris*, 23 *Cal.* 451.

40. Demurrer to Answer.—On the trial, the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may countervail it by proof, either in direct denial, or by way of avoidance. (*Cal. Pr. Act*, § 473.) A motion for judgment on the pleadings is equivalent to a demurrer to the answer, and objections which are required to be taken by special demurrer will be disregarded on such motion. *People v. Supervisors*, 27 *Cal.* 665.

41. Petition for Mandamus.—An application for a writ of mandate, to compel the performance of some act in which a large number of individuals are interested, which is made in the name of the people, and is not signed by the Attorney-General, but by an attorney of the relator, will not be dismissed because not made in the name of some one interested, if the Attorney-General unites in the brief in support of the application. (*People v. Supervisors of San Francisco*, 36

Cal. 595.) Averments necessary in petition for a *mandamus* to a county treasurer to pay county warrants, see (*Connor v. Morris*, 23 *Cal.* 447.) For sufficient statement in *mandamus* on declaring the result of an election, see *Calaveras Co. v. Brockway*, 30 *Cal.* 325.

42. Petition.—A petition for a *mandamus* to compel county commissioners to declare the petitioner register of deeds should aver affirmatively that a vacancy existed when the alleged election took place. (*Rose v. County Commissioners*, 50 *Maine*, 243.) A statement in a petition against a comptroller is bad if it fails to allege that there is "money not otherwise appropriated by law" out of which the compensation in question is to be paid. (*Redding v. Bell*, 4 *Cal.* 333.) In an application for a writ of mandate to compel a board of supervisors to levy a tax, the county into whose treasury the money intended to be raised by the tax will go can be the relator. (*People v. Alameda Co.*, 26 *Cal.* 641; see, also, *Supervisors v. United States*, 4 *Wall. U.S.* 435.) When a petition of a peremptory mandate to the Judge of a district court, to enter the name of the petitioner as an attorney of record in a cause, will be denied, see (*Herrington v. Sawyer*, 36 *Cal.* 289.) For petition for *mandamus* to command City Council to direct City Treasurer to pay expenses incurred in the support of schools, see *State v. City of Cincinnati*, 19 *Ohio Rep.* 178.





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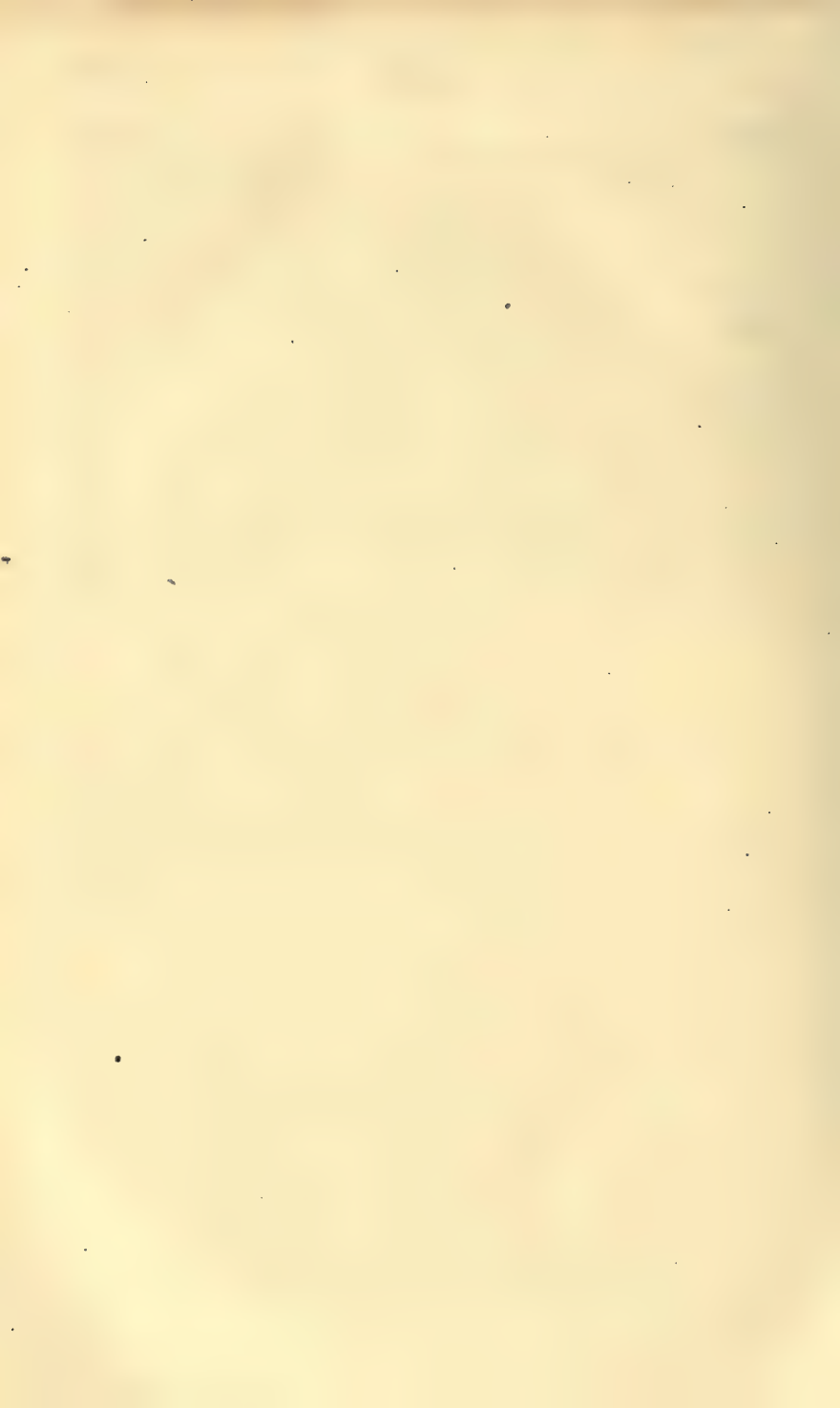
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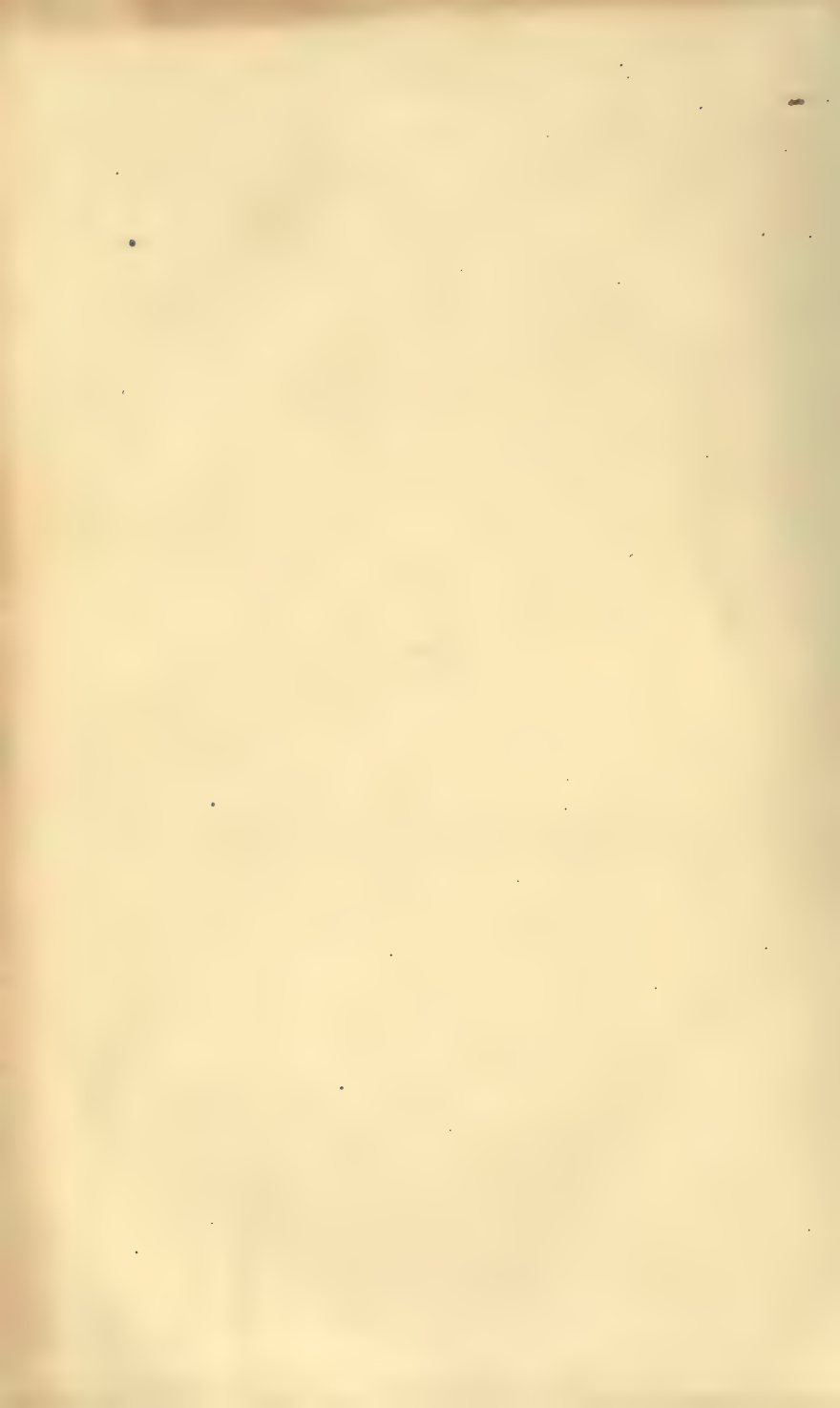
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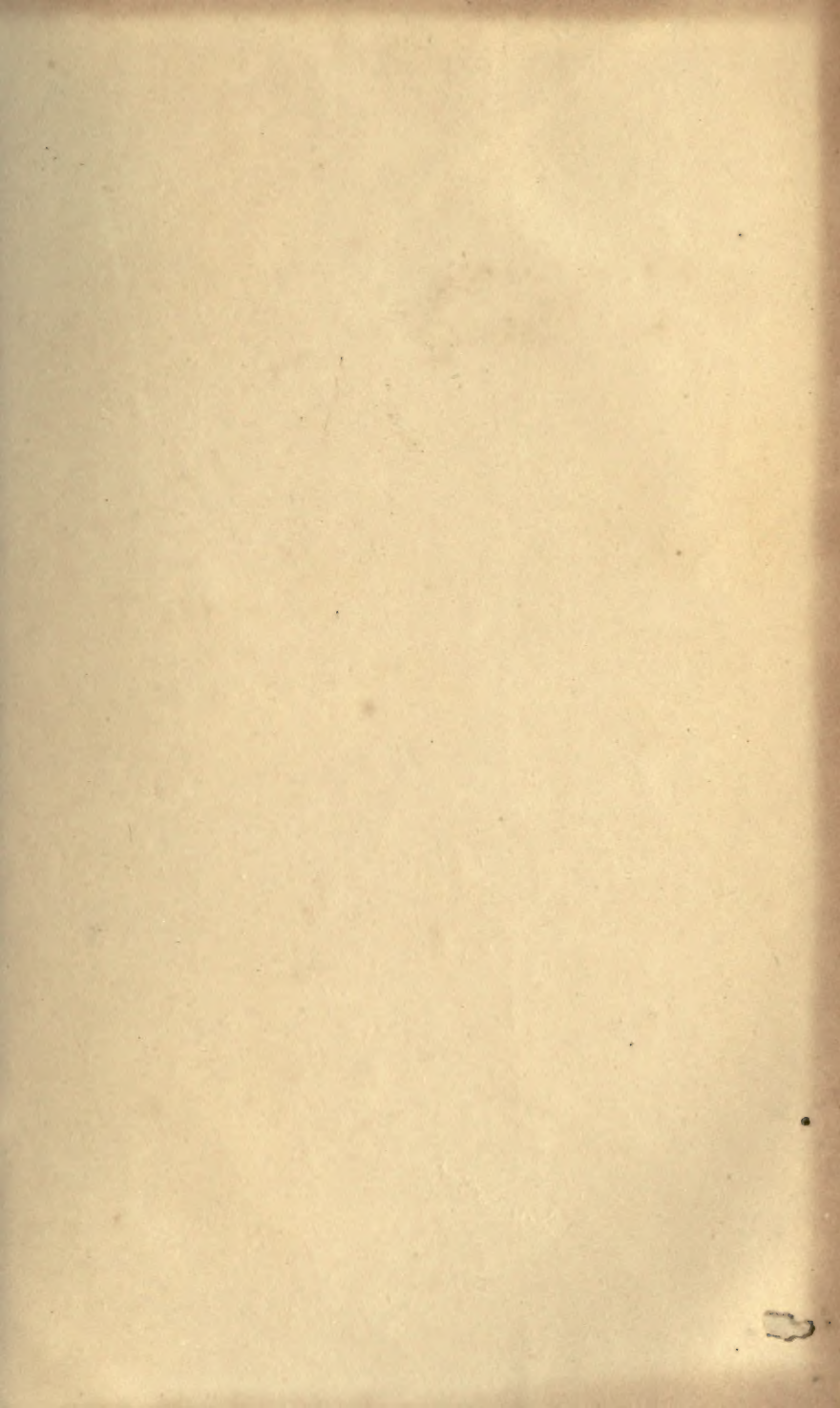
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